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IN THE

Supreme Court of the United States

DELICE RODRIQUE, MARTIN SCHAEFER, LANCE TEBLUM, *et.al.* and the 5054 other "opt-in" plaintiffs identified on the docket entries.

Petitioners,

v.

ECKERD CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942) ("*Missel*"), this Honorable Court held that under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a)(1), an employer that elects to pay a fixed salary for fluctuating work hours must set a "contractual limit" on the work hours paid for by its fixed weekly salary and make provision for overtime compensation. Does this Court's opinion in *Missel* remain binding on the lower courts or was it subsequently overruled by 29 C.F.R. § 778.114, a Department of Labor ("DOL") interpretive rule issued without public comment?

2. In *Leegin Creative Leather Products, Inc. v. PSKS*, 127 S.Ct. 2705 (June 28, 2007), this Honorable Court held that a DOL interpretive rule issued after public comment was entitled to a high level of deference in keeping with *Chevron, U.S.A, Inc. v. National Resources Defense Council, Inc.* ("*Chevron*"), 467 U.S. 837 (1984). Does the deference owed by the lower courts to this Honorable Court's *Missel* opinion trump the deference owed to 29 C.F.R. § 778.114, a subsequent DOL interpretive rule issued without public comment and therefore entitled to a lower level of deference in keeping with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) instead of *Chevron*?

3. Without analysis, the Court of Appeals alternately held that the parties' partial settlement precluded any further remedy. Inconsistent with that holding, the Court of Appeals correctly recognized in the body of its opinion that the record showed the *Missel* claims had not been settled. Does an erroneous conclusion about a partial settlement justify avoiding a significant statutory question as to whether *Missel* can be disregarded by the lower courts?

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Supreme Court Rule 29.6, the following are persons that have an interest in the outcome of this case or appeal.

Bill B. Berke, Berke & Lubell, Counsel for Petitioners

Jill H. Bowman, James Moyer, Newcomer & Smiljanich, Counsel for Petitioners

Joyce Brindle, F/k/a Joyce Cunliffe, Petitioner[1]

Nancy Civitarese, Petitioner

Edward J. Dimmerling, Petitioner

Susan Dolin, Rothstein Rosenfeldt Alder, Counsel for Eckerd Corporation

Respondent Eckerd Corporation

Eckerd Corporation of Florida, Inc.

Sam Heldman, The Gardner Firm, Counsel for Petitioners

Michael P. Malakoff, Doyle & Finberg, P.C., Counsel for Petitioners

Michael A. Pancier, Rothstein Rosenfeldt Adler, Counsel for Eckerd Corporation

Delice Rodrique, Petitioner

Bernadette Teblum, Petitioner

Lance Teblum, Petitioner

5,054 Opt-In Petitioners (29 U.S.C. § 216(b)), each identified by name on the docket entries in the two consolidated cases at *Rodrique v. Eckerd*, No. 06-13126-EE (M.D. Fla. No. 2:03-CV-00495) and *Teblum v. Eckerd*, No. 06-13129-EE (M.D. Fla. No. 2:03-CV-00519). The names of the 5,054 opt-in Plaintiffs will be immediately provided upon request.

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[1] All Petitioners are current or former employees of Eckerd Corporation.

CORPORATE DISCLOSURE STATEMENT

J.C. Penney Corporation, Inc., a publicly traded Delaware corporation

Eckerd Corporation

The Jean Coutu Group (PJC) Inc., d/b/a/ Brooks/ Eckerd

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CERTIFICATE OF INTERESTED PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	vi
INTRODUCTION	2
OPINIONS BELOW	4
JURISDICTION	4
STATUTORY AND REGULATORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	7
Relevant Facts	9
Relevant District Court Proceedings	11
Relevant Appellate Proceedings	14
REASONS FOR GRANTING THE PETITION	15
I. The Courts Below Erroneously Held That The Department Of Labor Overruled This Honorable Court's Decision in *Overnight Motor Transp. Co. v. Missel* ("*Missel*"), 316 U.S. 572 (1942)	15
II. The Courts Below Erroneously Held That DOL Interpretive Rule 29 C.F.R. § 778.114, Which Was Issued Without Public Comment, Was Entitled To A High Level Of Deference Under *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1974) Instead Of A Lower Level Of Deference Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)	21

TABLE OF CONTENTS—Continued

Page

III. The Court of Appeals' Erroneous Conclusion About A Partial Settlement Does Not Justify Avoiding A Significant Question As To Whether The Department Of Labor Has Overruled *Missel* 23

CONCLUSION 25

APPENDIX A—Order of the U.S. Court of Appeals, Eleventh Circuit, dated March 27, 2007, affirming the District Court's February 7, 2006 Order 1a

APPENDIX B—Order of the U.S. District Court for the Middle District of Florida, dated February 7, 2006, denying Eckerd's Motion for Summary Judgment 5a

APPENDIX C—Transcript of the February 9, 2007 Hearing in the U.S. District Court for the Middle District of Florida 44a

APPENDIX D—Order of the U.S. District Court for the Middle District of Florida, dated April 28, 2006, granting the parties' Joint Motion to Approve Settlement Agreement, denying Plaintiffs' Motion for Leave to File for Partial Summary Judgment, and denying Plaintiffs' Motion to Amend the District Court's Order of February 7, 2006 ..... 62a

APPENDIX E—Order of the U.S. District Court for the Middle District of Florida, dated May 18, 2006, denying Plaintiffs' Motion for Relief from Judgment under F.R.C.P. 60 ..... 72a

APPENDIX F—Memorandum to Counsel from the U.S. Court of Appeals, Eleventh Circuit, dated June 15, 2006, requesting briefing on jurisdictional question 78a

TABLE OF CONTENTS—Continued

Page

APPENDIX G—Order of U.S. Court of Appeals, Eleventh Circuit, dated August 11, 2006, stating jurisdiction exists 80a

APPENDIX H—Order of the U.S. Court of Appeals, Eleventh Circuit, dated May 22, 2007, denying Petition for Rehearing 81a

APPENDIX I—Mediated Settlement Agreement dated April 12, 2006 ..... 83a

TABLE OF AUTHORITIES

CASES	Page
149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (1947)	19
Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948)	15, 17, 24
Chevron, U.S.A, Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984)	21, 22
Leegin Creative Leather Products, Inc. v. PSKS, 127 S.Ct. 2705 (June 28, 2007)	20
Long Island Care at Home v. Coke, 127 U.S. 2339 (June 11, 2007)	21, 22
Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942)	*passim*
O'Brien v. Town of Agawam, 350 F.3d 279 (1st Cir. 2003)	18
Roper v. Simmons, 543 U.S. 551 (2005)	20
Sims v. EGA Products, Inc., 475 F.3d 865 (7th Cir. 2007)	23
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	21, 22
State Oil Co. v. Khan, 522 U.S. 3 (1997)	20
State Treasurer v. Barry, 168 F.3d 8 (11th Cir. 1999)	23
Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966)	14
Thompson v. City of Louisville, 362 U.S. 199 (1960)	24
United States v. Mead Corp., 533 U.S. 218 (2001)	21
Walling v. A.H. Belo Corp., 316 U.S. 624 (1942)	19
Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17 (1943)	18
Walling v. Stone, 131 F.2d 461 (7th Cir. 1942)	12, 18

TABLE OF AUTHORITIES

STATUTES — Page

28 U.S.C. § 1254(1) 4
28 U.S.C. § 1292(b) 12
29 U.S.C. § 206 7
29 U.S.C. § 207(a) ..... *passim*
29 U.S.C. § 216(b) 1

RULES AND REGULATIONS

29 C.F.R. § 541.99 22
29 C.F.R. § 778.1 ..... 5, 22
29 C.F.R. § 778.114 ..... *passim*

OTHER AUTHORITIES

Federal Rule of Civil Procedure 60 4
Rule 10(a) of the Rules of the Supreme Court of the United States 16, 25
Brief of Amicus Curiae, the Administrator of the Wage and Hour Division, United States Department of Labor, *Missel*, 316 U.S. 572 (No. 939) 3

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Petitioners, Delice Rodrique, Bernadette Teblum, Lance Teblum, Joyce Brindle, F/k/a Joyce Cunliffe, Nancy Civitarese, Virginia M. Hernandez, and Edward J. Dimmerling, and the 5,054 other Plaintiff-employees that "opted in" pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), respectfully request that a writ of certiorari issue to review the March 27, 2007 decision and judgment of the United States Court of Appeals for the Eleventh Circuit in the consolidated appeals of *Delice Rodrique and Martin Schaefer v. Eckerd Corporation of Florida and Eckerd Corporation*, No. 06-13126-EE, and *Lance Teblum, et al. v. Eckerd Corporation of Florida and Eckerd Corporation*, No. 06-13129, rehearing denied on May 22, 2007.

INTRODUCTION

At issue here is whether the Department of Labor ("DOL") has the power to overrule an opinion of this Honorable Court. The lower courts concluded that DOL interpretive rule 29 C.F.R. § 778.114, issued without public comment, overruled *Overnight Motor Transp. Co. v. Missel* ("*Missel*"), 316 U.S. 572 (1942).

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a)(1), requires that an employee's overtime work be compensated "at a rate not less than one and one-half times the regular rate" at which the employee is employed. In *Missel*, 316 U.S. 572, this Honorable Court considered whether an employer satisfied § 207(a)(1) by paying a fixed weekly salary to an employee whose work hours varied from week to week but whose hourly pay had always exceeded the minimum statutory wage plus 150% the minimum for each overtime hour. *Id.* at 574. The employment contract did not specify an hourly rate of pay, impose a limit on the work hours required for the fixed salary, or make provision for additional overtime compensation. *Id.* at 581.

The employer argued that the payment arrangement complied with 29 U.S.C. § 207(a)(1), because pay records showed that the salary had always been sufficient to pay the employee at least the minimum statutory wage for regular hours plus one and one-half times the minimum for each overtime hour. *Id.* at 574-575. In its amicus brief on the employee's behalf, the DOL Administrator identified the statutory issue as follows:

> The respondent was employed by the petitioner at a fixed weekly salary. Section 7 of the Fair Labor Standards Act requires additional compensation for overtime "at a rate not less than one and one-half times the regular rate" of compensation. May the employer avoid paying additional compensation for overtime merely because the fixed weekly salary is in excess of the minimum

> wage for full time plus one and one-half times the minimum rate for overtime?

Brief of Amicus Curiae, the Administrator of the Wage and Hour Division, United States Department of Labor at 2, *Missel*, 316 U.S. 572 (No. 939).

This Honorable Court rejected the employer's defense and held that its fixed salary for fluctuating hours violated 29 U.S.C. § 207(a)(1). *Id.* at 581. The Court concluded that the employer had not satisfied § 207(a)(1) merely by paying a fixed salary that had been large enough historically to provide the employee at least the minimum statutory wage for regular hours and one and one-half times the minimum for overtime hours. *Id.* at 581. The Court held that the employer's contract lacked two essential safeguards: "there was no contractual limit upon the hours which [the employer] could have required [the employee] to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage." *Id.* These safeguards ensure that the employer complies with the § 207(a)(1) by paying overtime compensation at 150% the regular rate received by the employee who works overtime. *Id.* at 577-78. "Implication cannot mend a contract so deficient in complying with the law." *Id.* at 581.

The DOL subsequently issued interpretive rule 29 C.F.R. § 778.114 without public comment. Section 778.114 provides that an employer can comply with 29 U.S.C. § 207(a)(1) by paying its employees a fixed salary for fluctuating work hours plus overtime compensation at one-half the employees' regular hourly rates. 29 C.F.R. § 778.114(a). As interpreted by the lower courts here, § 778.114(a) requires employers to make provision for overtime compensation—in the form of half-time—but does not require employers to impose a contractual limit upon the hours employees can be called upon to work for the fixed wage plus half-time. Pet. App. Ex. B.

(2/7/2006 Dist. Ct. Op. at 21a-24a); Pet. App. Ex. A (3/27/2007 11th Cir. Op. at 4a) ("We have reviewed this record and find no reversible error in the trial court's rulings."). In other words, § 778.114 has overruled *Missel* by eliminating one of the two conditions imposed on the payment of a fixed salary for fluctuating work. Respectfully, for the reasons set forth below, the lower courts here erred when they held that the DOL has the power to overrule an opinion of this Honorable Court.

OPINIONS BELOW

Plaintiff-Petitioners ("Plaintiffs") seek review of the March 27, 2007 Order of the United States Circuit Court for the Eleventh Circuit, which is reproduced in the Appendix at Pet. App. Ex. A. The Eleventh Circuit affirmed the February 7, 2006 and April 28, 2006 Orders of the United States District Court for the Middle District of Florida, which are reproduced in the Appendix, respectively, at Pet. App. Exs. B and C. The district court denied Plaintiffs' motion for relief under Federal Rule of Civil Procedure 60 in an Order dated May 18, 2006, which is reproduced in the Appendix at Pet. App. Ex. D. The Eleventh Circuit denied Plaintiffs' Petition for Rehearing En Banc in an Order filed on May 22, 2007, which is reproduced in the Appendix at Pet. App. Ex. H.

JURISDICTION

This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1). On June 15, 2006, the Eleventh Circuit ordered separate briefing on the issue of jurisdiction (Pet. App. Ex. F). On August 11, 2006, the Eleventh Circuit held that appellate jurisdiction existed. Pet. App. Ex. G. The Eleventh Circuit's merits decision was issued on March 27, 2007, and rehearing was denied on May 22, 2007. Pet. App. Exs. A, H.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

FLSA, 29 U.S.C. § 207(a)(1), entitled "Maximum Hours," states in part with respect to overtime compensation:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

The Department of Labor's ("DOL") interpretive rule, 29 C.F.R. § 778.1, entitled "Purpose of Interpretive Bulletin," states:

> This Part 778 constitutes the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of the Act. It is the purpose of this bulletin to make available in one place the interpretations of these provisions which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 FR 3290).

DOL interpretive rule, 29 C.F.R. § 778.114, entitled "Fixed Salary For Fluctuating Hours," states:

> (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and

the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in

each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule.

STATEMENT OF THE CASE

In *Missel*, 316 U.S. 572, 581 (1942), this Honorable Court rejected the same defense accepted by the lower courts here: that an employer's fixed salary satisfied the FLSA's overtime provision, 29 U.S.C. § 207(a)(1), because viewed in hindsight, it had always paid the employee at least the minimum statutory wage plus one and one-half times the minimum for overtime work. *Id.* at 575, 583. Unlike the lower courts here, the Court in *Missel* concluded that the regular rate of pay was not synonymous with the minimum statutory wage under 29 U.S.C. § 206. *Id.* at 577-578. To ensure that an employee receives 150% of his regular rate of pay for overtime hours, as required by § 207(a)(1), this Honorable Court held that an employer paying its employee a fixed wage for fluctuating hours must: (a) set a "contractual limit" on the hours paid for by the fixed salary; and (b) make provision for additional

compensation when the salary is insufficient to pay the employee's regular hourly rate plus one and one-half times that rate for overtime work. *Id.* at 583. By requiring these safeguards on the payment of a fixed salary for fluctuating hours, the Court prevented employers from circumventing the express language of the act, which requires employers to pay for overtime work at 150% of an employee's regular rate of pay. *Id.* at 580-81.

The Court in *Missel* found that when an employee works fluctuating hours for a fixed salary, the employee's "regular rate," as that term is used in § 207(a)(1), decreases as the hours worked increase. *Id.* at 580. The "contractual limit" on the hours an employee can be called upon to work for a fixed salary ensures that fluctuating workweek employees learn their minimum regular rate at the outset of their employment relationships. It also prevents employers from failing to set a minimum regular rate, instead relying on the minimum statutory wage as a default.

This Petition primarily centers on the question of whether reasons exist to disregard the interpretation of the FLSA set forth in *Missel*, 316 U.S. 572, 581 (1942), as the lower courts have done here. The district court concluded that *Missel* was overruled by a DOL interpretive rule issued in 1968, 29 C.F.R. § 778.114, which was amended and interpreted by the addition of § 778.114(b) in 1981. In the words of the district court in its February 7, 2006 summary judgment opinion, *Missel* did not constitute "binding precedent" here. Pet. App. Ex. B (2/7/2006 Op. at 21a). This was because "*Missel* was decided before the Department of Labor issued its regulations on the FWW . . . the Court in *Missel* was not discussing an FWW plan as regulated by the Department of Labor's regulations, with the other protections to the worker the FWW affords." Pet. App. Ex. B (2/7/2006 Op. at 22a).

In the district court's view, the key factor distinguishing the payment method considered in *Missel* from Eckerd's

FWW method here was that the employer in *Missel* had made no additional overtime payments, while Eckerd pays a half-time rate for overtime hours in addition to its fixed weekly salary:

> [T]here was no provision for overtime pay [in *Missel*], as the unchanging weekly salary contemplated overtime pay. Such a plan is different from the FWW plan described in the Department of Labor's regulations. It is easy to see why the Supreme Court emphasized the importance of a maximum number of hours to be worked per week, as the employees contemplated by the Court received the same amount of pay per pay period, no matter how many hours they were asked to work, and no overtime premiums were paid.

Pet. App. Ex. B (2/7/2006 Op. at 22a).

The district court erroneously disregarded that the Court in *Missel* held § 207 imposed two conditions on the payment of a fixed salary for fluctuating hours—provision for overtime payments and a "contractual limit" on the number of hours paid for by the fixed salary. *Missel*, 316 U.S. 572, 581. Here, Eckerd made provision for overtime payments, but failed to set a "contractual limit" on the number of hours an employee can be called upon to work for a fixed salary plus half-time. The district court effectively held that by requiring employers to make provision for overtime payments, 29 C.F.R. § 778.114 eviscerated the need for a "contractual limit" on the number of hours paid for by a fixed salary. Pet. App. Ex. B (2/7/2006 Op. at 22a). Thus, as interpreted by the district court, 29 C.F.R. § 778.114 overruled this Court's *Missel* decision.

Relevant Facts

Eckerd required each of its fluctuating workweek ("FWW") employees to sign a Fluctuating Workweek Agreement ("FWWA"), which explained Eckerd's method of payment:

> [T]he number of hours that you will be required to work will fluctuate from week to week. You will receive a weekly base salary representing straight time pay for all hours worked (whether greater or fewer than 40 hours) during the week . . . you will also receive additional pay for all hours worked over 40 during the workweek.

Rec. Ex. F-659 (Ex. A to Eckerd Counsel Mr. Sidman's Declaration).[1] The FWWA set forth the following formula for calculating overtime compensation:

> Hourly Rate = Base Salary ÷ # hours worked (Rate may not fall below minimum wage)
>
> (Hourly Rate ÷ 2) x hours over 40 = Additional Pay
>
> Base Salary + Additional Pay = Total Gross Pay
>
> Example:
>
> $400 base salary ÷ 50 hours per week = $8 per hour
>
> $8 per hour ÷ 2 = $4 per hour x 10 overtime hours = $40 additional pay
>
> $400 base salary + $40 additional pay = $440 total gross pay

Rec. Ex. F-659 (Ex. A to Sidman Decl.).

The FWWA informed FWW Employees that they would receive a base salary each week plus additional overtime compensation at one-half their regular hourly rate ("half-time"). Rec. Ex. F-659 (Ex. A to Sidman Decl.). The employee's overtime pay rate, as provided for in Eckerd's FWWA, decreased with each additional overtime hour. The FWWA, however, did not state a "contractual limit" on the number of hours FWW Employees could be required to work for the base salary plus half-time at an ever-decreasing rate.

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[1] "Rec. Ex. _" references a document contained in the Record Excerpts filed on appeal to the Eleventh Circuit.

The FWWA also failed to state that the FWW Employees' pay would never fall below the minimum statutory wage plus 150% of the minimum for overtime work. Thus, FWW Employees could not have learned, from reviewing Eckerd's FWWA: (a) their regular rate of pay in the weeks in which Eckerd called upon them to work the greatest number of hours; or (b) whether their regular rate of pay in those weeks would fall above or below the minimum statutory wage.

Relevant District Court Proceedings

The district court in its February 7, 2006 summary judgment opinion succinctly summarized Eckerd's FWWA half-time payment method:

> Plaintiffs were compensated using the FWW method of compensation. Under the FWW, employees receive a weekly salary calculated on the basis of 40 hours of work per week plus additional half time for all hours worked in excess of 40 hours per week. Perhaps the most distinguishing feature of FWW is that, under FWW, employees are compensated for overtime (hours over 40 per week) at a rate of one half times regular rate of pay, rather than one and one half times the regular rate of pay.

Pet. App. Ex. B (2/7/2006 Op. at 10a-11a). The district court candidly found that there was no "contractual limit" on the overtime hours that Eckerd could call upon its employees to work in exchange for its fixed weekly salaries, concluding that Eckerd "would pay Plaintiffs a fixed salary regardless of the number of hours worked." Pet. App. Ex. B (2/7/2006 Op. at 24a).

The district court recognized that Eckerd's FWWA was similar to the agreement in *Missel* but nonetheless concluded that *Missel* was not "binding precedent" here. Pet. App. Ex. B (2/7/2006 Op. at 21a). The district court concluded that it could disregard this Honorable Court's holding in *Missel* that,

to comply with the FLSA, 29 U.S.C. § 207, an employer paying a fixed salary for fluctuating hours must set a "contractual limit" on the work hours paid for by the fixed salary and make provision for additional overtime compensation. *Id.*

Plaintiffs filed an out-of-time motion for summary judgment on February 22, 2006, requesting the district court to settle whether its February 7, 2006 opinion was intended to resolve Plaintiffs' other *non-Missel* claims (referred to in the district court as the "60-hour" and "conversion" claims). Rec. Ex. A (Teblum Docket Entries ("TD")-745). In addition, on March 10, 2006, Plaintiffs timely filed a motion requesting permission to take an immediate appeal under 28 U.S.C. § 1292(b) on the *Missel*-related issues. Rec. Ex. A (TD-750). The identified issues included:

- Does *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942) interpret § 7 of the FLSA so as to require that the employer, before using a fluctuating workweek method, determine a "contractual limit upon the hours which [the] employer could have required [the] employee to work for [the] agreed wage . . ." even when additional one-half time will be paid?;
- Did the Seventh Circuit in *Walling v. Stone*, 131 F.2d 461, 462-63 (7th Cir. 1942) correctly interpret the Supreme Court's opinion in *Missel* when it held that § 7 of the FLSA requires an "upper limit on the total number of hours to be worked for a fixed salary . . ."?;

Rec. Ex. A (TD-750).

While both of these motions were pending, the parties agreed to a partial settlement on the small remaining claims that the district court had not dismissed in its February 7, 2006 opinion (the so-called "non-productive time" claims). Pet. App. Ex. I (Rodrique Docket Entries ("RD")-299 (Medi-

ated Settlement Agreement)); Pet. App. Ex. B (2/7/2006 Op. at 24a-30a). This partial settlement explicitly preserved Plaintiffs' *Missel* claims as well as the other claims identified of record in their two then-unresolved motions. Pet. App. Ex. I (RD)-299 (Mediated Settlement Agreement)). The parties' Settlement Agreement, ¶ 7, provided:

> [T]he parties agree that they do not waive any claims or defenses with respect to the pending motions or any further proceedings in this matter which are available to them under law. (Emphasis added).

Pet. App. Ex. I (RD-299 (Med. Set. Agmt., 4th whereas clause ¶7)). Under this settlement, Eckerd could set off its partial settlement payments against any future monetary recovery:

> The parties agree that should the Plaintiffs prevail in the remaining matters not settled here, that the Defendant is entitled to an offset as to the damages [$156,000] and fees [$144,000] which have been actually paid pursuant hereto. (Emphasis added).

Pet. App. Ex. I (RD-299 (Med. Set. Agmt., 4th whereas clause ¶ 5)). This, too, demonstrated the parties' agreement not to settle Plaintiffs' *Missel* claims.

On April 28, 2006, the district court (1) approved the parties' partial settlement; (2) denied Plaintiffs' request to file their motion for summary judgment; (3) denied Plaintiffs' § 1292(b) certification request; and (4) ordered that the clerk close both cases. Pet. App. Ex. D (4/28/2006 Op.).

On May 4, 2006, Plaintiffs filed a Federal Rule of Civil Procedure 60 motion, once again seeking clarification as to whether the district court, by its prior summary judgment opinion, had intended to resolve their 60-hour and conversion claims. Rec. Ex. B (RD-301). On May 18, 2006, that motion

was denied. Pet. App. Ex. E (5/18/2006 Order). On May 25, 2006, a timely appeal was filed.[2]

Relevant Appellate Proceedings

An Eleventh Circuit Motions Panel had the same "finality" concerns as Plaintiffs, and by briefing order dated June 15, 2006, *sua sponte* questioned whether all the claims had been resolved in the district court. Pet. App. Ex. F (6/15/2006 Memorandum to Counsel). By order dated August 10, 2006, the Motions Panel concluded that the court had appellate jurisdiction. Pet. App. Ex. G (8/11/2006 Order). On March 27, 2007, the Eleventh Circuit Merits Panel in a *per curiam* opinion, without analysis, affirmed the district court's holding that *Missel* was no longer binding. It stated "[w]e have reviewed this record and find no reversible error in the trial court's rulings." Pet. App. Ex. A (3/27/07 Op. at 4a).

In addition, in the body of its opinion, the Eleventh Circuit correctly recognized that the parties' partial settlement was, by definition, "partial" and had been limited to the relatively nominal factual claims (the so-called "non-productive" claims) that remained after the district court issued its February 7, 2006 summary judgment rulings. Pet. App. Ex. B (2/7/2006 Op. at 24a-30a). The Eleventh Circuit, based on the record, thus correctly found that:

> [T]he parties settled the sole issue left unresolved in the court's order denying Eckerd's motion for summary judgment: Eckerd's computation of non-productive time into overtime compensation. On April 25, 2006, the parties filed a motion to approve that settlement.

Pet. App. Ex. A (3/27/2006 Op. at 3a).

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[2] The adverse summary judgment rulings that district court made on February 7, 2006, dismissing Plaintiffs' claims based on *Missel*, automatically merged into the district court's final April 28, 2006 judgment. *See Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966).

Inconsistently, however, the Eleventh Circuit concluded, "[t]he procedural history, including the partial settlement of the FWW issue, precludes any relief at this juncture." Pet. App. Ex. A (3/27/07 Op. at 4a). This holding was inconsistent with the parties' partial settlement and the record facts as correctly set forth earlier in the opinion. Pet. App. Ex. A (3/27/2006 Op. at 3a).

REASONS FOR GRANTING THE PETITION

I. The Courts Below Erroneously Held That The Department Of Labor Overruled This Honorable Court's Decision in *Overnight Motor Transp. Co. v. Missel* ("*Missel*"), 316 U.S. 572 (1942)

Petitioners respectfully submit that certiorari is warranted to determine whether there are valid reasons that would allow the lower courts to disregard *Missel* and thereby deprive the over 5,000 employees in this litigation of their statutory rights to be paid overtime compensation in accordance with *Overnight Motor Transp. Co. v. Missel* ("*Missel*"), 316 U.S. 572 (1942). *See Bay Ridge Operating Co. v. Aaron* ("*Bay Ridge*"), 334 U.S. 446, 459 ("On account of the importance of the method of computing the regular rate of pay in employment contracts providing for extra pay, we granted certiorari.")

The district court, in its 45-page summary judgment opinion, candidly found that *Missel* "may have determined that an employment contract similar to a modern-day FWW plan was deficient because it did not require a limit on the hours the employee could have been required to work for the agreed wage . . . ." Pet. App. Ex. B (2/7/2006 Op. at 22a). Despite this relevant conclusion, the district court held that *Missel* did not constitute "binding precedent" (Pet. App. 21a (2/7/2006 Op. at 21a)) and went on to reason:

> This Court notes that *Missel* was decided before the Department of Labor issued its regulations on the FWW. While the Supreme Court may have determined that an

> employment contract similar to a modern-day FWW plan was deficient because it did not require a limit on the hours the employee could have been required to work for the agreed wage, the Court in *Missel* was not discussing an FWW plan as regulated by the Department of Labor's regulations, with the other protections to the worker the FWW affords.

Pet. App. Ex B (2/07/2006 Op. at 22a). On March 27, 2007, the Eleventh Circuit affirmed without analysis.[3] *See* Pet. App. Ex. A.

This Honorable Court in *Missel* explicitly interpreted the FLSA, 29 U.S.C. § 207(a)(1), to hold that an employer that elects to pay a fixed salary for fluctuating hours must, *inter alia*, determine a "contractual limit" on the number of hours paid for by its fixed weekly salary:

> It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. [1] But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and [2] no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law.

Id. at 581 (emphasis added). This Honorable Court reasoned that the FLSA, 29 U.S.C. § 207(a), did not merely require employers to pay overtime compensation at 150% the minimum statutory wage. *Id.* at 577-78. Instead, the Court held that "the act was designed to require payment for overtime at time

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[3] In affirming the district court, the Eleventh Circuit failed to use its supervisory authority to reign in the district court, which respectfully had departed from the customary and normal course of abiding by this Honorable Court's opinions. *See* Rule 10(a) of the Rules of the Supreme Court of the United States.

and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at the minimum." *Id.* at 578. This was because an "intended effect" of the FLSA "was to require extra pay for overtime work by those covered by the act even though their hourly wages exceeded the statutory minimum." *Id.* at 577. *See also Bay Ridge*, 334 U.S. 446, 470 (The purpose of the forty-hour maximum provision of 29 U.S.C. § 207 "is also to compensate an employee in a specific manner for the strain of working longer than forty hours.") The FLSA thereby applied "financial pressure . . . to spread employment to avoid the extra wage . . . ." in addition to ensuring workers "additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act." *Missel*, 316 U.S. at 578. Thus, this Court held that when an employer pays a fixed salary for fluctuating hours, there is no way to ensure that the employee receives the "additional pay" contemplated by the act unless both a contractual limit on hours and provision for additional overtime compensation are present. *Id.* at 577-581.

The district court disagreed and judicially abrogated this Honorable Court's two-prerequisite test in *Missel* by eliminating the test focused on the "contractual limit." The district court expressly held that an employer that made provision for additional overtime payments, as Eckerd did here with its "half-time" payments, was not obligated by *Missel* to place a "contractual limit" on the number of hours an employee could be required work for a fixed salary plus half-time:

> Importantly, the Court in *Missel*, in discussing a fluctuating work week plan, described a compensation plan with a weekly salary that remained fixed, even though the number of hours worked per week varied, and there was no provision for overtime pay, as the unchanging weekly salary contemplated overtime pay. Such a plan is different from the FWW plan described in the Department of Labor's regulations . . . as the employees

> contemplated by the Court received the same amount of pay per pay period, no matter how many hours they were asked to work, and no overtime premiums were paid.

Pet. App. B (2/7/2006 Op. at 22a).

Significantly, although disregarded by the lower courts in their opinions, this Honorable Court has repeatedly interpreted *Missel* like Plaintiffs and has emphasized the importance of the "contractual limit" under FLSA § 207(a)(1). In *Walling v. Halliburton Oil Well Cementing Co.* ("*Halliburton*"), 331 U.S. 17, 23 (1943), for example, this Court held that an FWWA was illegal in "the absence of any agreement between the contracting parties for the payment of a specified rate and overtime, and of any contractual limitation on the number of hours the employee could be required to work for the fixed wage." (Emphasis added).

The lower courts here also disregarded the law of other appellate courts interpreting *Missel* and thereby created a split in appellate authority. For example, the First Circuit recognized after the issuance of 29 C.F.R. § 778.114 that *Missel* has "binding effect." *O'Brien v. Town of Agawam*, 350 F.3d 279, 287 n.15 (1st Cir. 2003).[4] Similarly, in *Walling v. Stone*, 131 F.2d 461, 462-63 (7th Cir. 1942), the Seventh Circuit interpreted *Missel* to require an "upper limit on the total number of hours to be worked for a fixed salary," or a "specified rate," holding:

> The Supreme Court [in *Missel*] held that the contract did not comply with the requirements of Sec. 7 of the Act and pointed out that two elements are essential in a contract of employment in order to comply with the Act: (1) Either a stated hourly rate for regular work or an upper limit on the total number of hours to be worked

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[4] *O'Brien*, 350 F.3d 279, involved police officers. The fluctuating workweek payment method is often used to compensate police officers, firefighters, and paramedics.

> for a fixed salary, and (2) an express provision that overtime should be paid for at time and one-half the regular rate. If the first element is absent from a contract the hours worked might require minimum compensation greater than the fixed wage; if the second is absent, overtime work could be paid for at any rate equal to or greater than the regular rate. Thus, neither of these elements alone is sufficient for compliance with the law—both must be present. In the case at bar, both are absent.

Id. at 462-63 (emphasis added).[5]

In addition, in *Walling v. A.H. Belo Corp.* ("*Belo*"), 316 U.S. 624, 634 (1942), (decided the same day as *Missel)*, this Honorable Court explained why the *Missel* fluctuating workweek failed but the *Belo* contract complied. Specifically, the Court held that the *Belo* contract had both necessary safeguards (a specified hourly rate—the equivalent of a limit on work hours—and an overtime provision), while the *Missel* contract had neither:

> But the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the Act. It is entirely unlike the Missel case, *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682, decided this day. In the contract in that case there is no stated hourly wage and no provision for overtime.

Id. at 634 (emphasis added).

Despite the passage of time, *Missel* remains binding precedent on the lower courts since neither this Honorable Court

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[5] A "specified hourly rate" is defined by this Honorable Court as "a fixed hourly rate in terms of a stipulated amount per hour provided a formula whereby such a fixed hourly rate could be calculated." *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203 (1947).

nor Congress has said otherwise. *See Roper v. Simmons*, 543 U.S. 551 (2005) ("[I]t remains *this* Court's prerogative *alone* to overrule one of its precedents."). The fundamental doctrine of *stare decisis* prohibits the abandonment of this Honorable Court's precedent that occurred here. As explained in *Leegin Creative Leather Products, Inc. v. PSKS*, 127 S.Ct. 2705 (June 28, 2007):

> Even if *Dr. Miles* [220 U.S. 373 (1911)] established an erroneous rule, '*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right.' [*State Oil Co. v.*] *Kahn*, 522 U.S., at 20 [(1997)] (interral quotation marks omitted). And concerns about maintaining settled law are strong when the question is one of statutory interpretation. *See, e.g., Hohn v. United States*, 524 U.S. 236, 251 (1998).

Thus, the fundamental issue presented is whether the DOL's legal interpretation of the FLSA, 29 U.S.C. § 207(a)(1), trumps this Honorable Court's own interpretation of § 207(a)(1) in *Missel*. It is hornbook law that "[i]t is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). This legal principle is so fundamental that respectfully, it calls for this Honorable Court's review under Supreme Court Rule 10(a) because the Eleventh Circuit, under its supervisory authority, allowed the district court to depart quite far from the customary and normal course of judicial proceedings. Respectfully, before the named and 5,054 opt-in Plaintiffs are judicially deprived of time and one-half time overtime in the manner specified by Congress, as interpreted in *Missel*, this Honorable Court should grant *certiorari* to determine whether the lower courts are free to disregard *Missel*.

II. The Courts Below Erroneously Held That DOL Interpretive Rule 29 C.F.R. § 778.114, Which Was Issued Without Public Comment, Was Entitled To A High Level Of Deference Under *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1974) Instead Of A Lower Level Of Deference Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)

The lower courts accorded interpretive rule 29 C.F.R. § 778.114 deference under the higher *Chevron, U.S.A, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) standard instead of the lower *Skidmore v. Swift & Co.*, 327 U.S. 134 (1944) standard. Pet. App. Ex. B (2/7/2006 Op. at 23a). *See generally United States v. Mead Corp.*, 533 U.S. 218 (2001). This higher *Chevron* deference standard appears applicable to interpretive rules that, unlike § 778.114, are at least made available for public comment before issuance. *Long Island Care at Home v. Coke*, 127 U.S. 2339 (June 11, 2007).

The district court (and the Panel by its affirmance) held that 29 C.F.R. § 778.114 was a regulation entitled to substantial deference under *Chevron*. Pet. App. Ex B (2/7/2006 Op. at 22a). The district court also concluded that this Honorable Court's opinion in *Missel* was not "binding precedent" Pet. App. Ex. B (2/7/2006 Op. at 21a), because the DOL "regulation" overruled the *Missel* opinion:

> This Court notes that Missel was decided before the Department of Labor issued its regulations on the FWW. While the Supreme Court may have determined that an employment contact similar to a modern-day FWW plan was deficient because it did not require a limit on the hours the employee could have been required to work for the agreed wage, the Court in *Missel* was not discussing an FWW plan as regulated by the Department of

> Labor's regulations, with the other protections to the worker the FWW affords.

Pet. App. Ex. B (2/7/2006 Op. at 22a). DOL "regulations" and "interpretive rules" under the FLSA are technical terms, not mere labels, and under this Court's caselaw are not the same. DOL regulations, properly issued and made available for public comment (generally pursuant to the Administrative Procedures Act ("APA")) prior to issuance, may constitute a "law" and qualify for *Chevron* deference. *See Long Island Care at Home, Ltd. v. Coke*, 127 U.S. 2339 (2007). *See also Bay Ridge*, 334 U.S. 446, 461 ("As no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency.") In contrast, DOL interpretive rules not made available for comment never constitute a law and therefore, are subject to only *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) deference. It would not appear possible for a DOL interpretive rule like § 778.114 (*i.e.*, a legal interpretation of FLSA § 207(a)(1)) to overrule this Honorable Court's interpretation of § 207(a)(1).[6] Respectfully, this Honorable Court should determine whether a DOL interpretive rule not subject to public comment provides a basis for the lower courts to disregard this Honorable Court's opinions.

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[6] Significantly, the DOL itself states that the interpretive rules in Part 778 (sometimes called "interpretive bulletins") are only advisory. *See* 29 C.F.R. § 778.1 (entitled "Purposes of Interpretive bulletin.") In contrast, DOL regulations are usually (but not always) issued under the APA. *See* 29 C.F.R. § 541.99 (recognizing that the DOL has the authority to issue regulations, as to some but not all employment issues in accordance with the APA.)

III. The Court of Appeals' Erroneous Conclusion About A Partial Settlement Does Not Justify Avoiding A Significant Question As To Whether The Department Of Labor Has Overruled *Missel*

The Eleventh Circuit in the body of its March 27, 2007 opinion correctly summarized the record proceedings (and the parties' partial settlement) and concluded:

> [T]he parties [after February 7, 2006] settled the sole issue left unresolved in the court's order denying Eckerd's motion for summary judgment: Eckerd's computation of non-productive time into overtime compensation. On April 25, 2006, the parties filed a motion to approve that settlement. (Emphasis added).

Pet. App. Ex. A (3/27/2007 Op. at 3a)

Inconsistently, the Eleventh Circuit in an alternate holding concluded that "[t]he procedural history, including the partial settlement of the FWW issues, precludes any relief at this juncture." Pet. App. Ex. A (3/27/2007 Op. at 4a) (Emphasis added).

Given the undisputed record facts as found by the Eleventh Circuit in the body of its own opinion, it could not be reasonably concluded that a partial settlement that expressly preserved certain claims for purposes of appeal could even arguably preclude future relief. *See Sims v. EGA Products, Inc.*, 475 F.3d 865, 867 (7th Cir. 2007)("A settlement that reserves an issue for appeal is final, not only because it resolves the litigation if no appeal ensues, but also because an affirmance leaves that disposition in place."). *See also State Treasurer v. Barry*, 168 F.3d 8, 15 (11th Cir. 1999)("In order to appeal a court's rulings on some claims, a party may settle

the remaining claims in some fashion and dismiss them with prejudice.")[7]

The FLSA was enacted to address "hours as well as wages" (*Missel*, 316 U.S. at 576), and, as stated in *Bay Ridge*, 334 U.S. 446, 459, the FLSA's "purpose was to [1] compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and [2] to spread employment through inducing employers to shorten hours because of the pressure of extra cost." Both congressional goals are undercut because under the FWW method endorsed by the lower courts (that judicially abrogated this Court's "contractual limit" requirement), the employer would oftentimes be able to pay less for an overtime hour than for a non-overtime hour whenever the contractual non-overtime rate is higher than the statutory rate.

The Eleventh Circuit's failure to adhere to its statement of the record (as correctly stated at Pet. App. Ex. A (3/27/2007 Op. at 3a)), respectfully warrants certiorari because it is "void as [a] denial[] of due process." *Thompson v. City of Louisville*, 362 U.S. 199, 204 (1960)(a dispute over a mere $20 was deemed worthy of certiorari where there was absolutely no evidentiary support for the fine). Respectfully, this Honorable Court should grant review to correct the Eleventh Circuit's failure to use its supervisory powers over a district

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[7] The *Missel* claims had been estimated, and the payroll records filed on May 26, 2005 evidenced additional damages of tens of millions of dollars over the small sum Eckerd paid in the partial settlement. Plaintiffs' counsel thus stated at the February 9, 2006 hearing that the "big issues were resolved by the Court [in its summary judgment rulings]. This went from a $50 million case to probably under a million dollars." Pet. App. Ex. C (2/9/2006 Hearing Tr. at 44a, 54a). The district court agreed, stating, "I understand what you're saying and how this case has changed, how you need to take an appeal. . . ." Pet. App. Ex. C (2/9/2006 Hearing Tr. at 44a, 55a). Plaintiffs then filed a timely appeal from the district court's adverse *Missel* rulings.

court that has elected to disregard one of this Honorable Court's opinions. *See* Supreme Court Rule 10(a).

CONCLUSION

For the reasons stated above, this Honorable Court is respectfully requested to grant a writ of certiorari to the Eleventh Circuit in order to determine whether *Missel* can be properly disregarded by the lower courts.

Respectfully submitted,

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APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed March 27, 2007]

No. 06-13126

D.C. Docket No. 03-00519-CV-FTM-99SPC

DEUCE RODRIQUE,
Plaintiff,

MARTIN SCHAEFER,
Plaintiff-Appellant,

versus

ECKERD CORPORATION OF FLORIDA, INC.,
Defendant,

ECKERD CORPORATION,
Defendant-Appellee.

No. 06-13129

D.C. Docket No. 03-00495-CV-FTM-33DNF
2:03cv00495 & 2:03cv00673

LANCE TEBLUM, et al.,
Plaintiffs-Appellants,

versus

ECKERD CORPORATION OF FLORIDA, INC.,
Defendant,

ECKERD CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(March 27, 2007)

Before BARKETT, KRAVITCH and STAHL,* *Circuit Judges*.

PER CURIAM:

Martin Schaefer and Lance Teblum ("Plaintiffs") appeal from (1) a Final Judgment denying the motion for leave to file for partial summary judgment and directing that the case be closed; (2) a February 7, 2006 order on Eckerd's motion for summary judgment; and (3) a May 18, 2006 order denying their motion for relief from judgment.

Plaintiffs, acting individually and on behalf of all others similarly situated, sued Eckerd Corporation of Florida, Inc. and Eckerd Corporation ("Eckerd") alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., for misclassification of employees as "exempt" under the Act.[1] Eckerd removed the case to federal court and, in its answer, raised as an affirmative defense the use of a fluctuating workweek method ("FWW") of compensation permitted by the Act as an alternative form of compliance. Eckerd then filed a motion for summary judgment on April 8, 2005.

Plaintiffs filed two separate motions to enlarge the time to respond to Eckerd's motion, several pleadings pertaining to the length of a permissible response, and ultimately, on June 16, 2005, filed their response to Eckerd's summary judgment

* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

[1] Eckerd Corporation of Florida, Inc. and plaintiff Delice Rodrique were subsequently dismissed from the case.

motion. They did not file a motion for summary judgment of their own. Their response simply addressed the FWW.

For summary judgment purposes, the district court consolidated this case with *Teblum v. Eckerd Corp*, in which another class of employees sought the same relief as Rodrique and Schaefer. The court first determined that the Department of Labor had indeed provided alternative ways for employers to meet the overtime requirements of the Act, and that the FWW was one such acceptable method. Accordingly, Plaintiffs were not, in fact, misclassified as "exempt employees," as their complaint alleged. Plaintiffs did not dispute this, and simply argued that Eckerd had not met all of the five requirements of the FWW. The court determined that Eckerd's compensation plan met four of the five required elements of a valid FWW method, but that a genuine issue of material fact existed as to Eckerd's computation of non-productive time into overtime compensation. For this reason, the district court denied Eckerd's motion for summary judgment on February 7, 2006.

Two days later, on February 9, 2006, the court held a pretrial conference. Shortly thereafter, Plaintiffs filed a motion for leave to file an untimely motion for summary judgment and to amend the district court's order denying Eckerd's motion for summary judgment so as to permit a certification for an interlocutory appeal. At some time in the interim, the parties settled the sole issue left unresolved in the court's order denying Eckerd's motion for summary judgment Eckerd's computation of non-productive time into overtime compensation. On April 25, 2006, the parties filed a joint motion to approve that settlement agreement.

On April 28, 2006, the district court granted the motion, finding that "the settlement fairly and reasonably resolve[d] the disputed issues in this matter" and constituted a reasonable compromise. The court then denied Plaintiffs' motion for leave to file for partial summary judgment, finding that it

would be prejudicial to Eckerd to allow such a motion at this late stage of the proceedings. Finally, the court directed the clerk to terminate all pending motions and close the case. On May 4, 2006, Schaefer filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), challenging the closure of the case and attempting to argue the issues raised in their untimely motion for partial summary judgment, which had not been permitted to be filed. The district court denied the motion, and Plaintiffs brought this appeal.

We have reviewed this record and find no reversible error in the trial court's rulings. The procedural history, including the partial settlement of the FWW issue, precludes any relief at this juncture.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No. 2 : 03-cv-495-FtM-33DNF

LANCE TEBLUM, BERNADETTE TEBLUM, JOYCE BRINDLE F/K/A JOYCE CUNLIFFE, NANCY CIVITARESE, and RHONDA KLINE,

Plaintiffs,

vs.

ECKERD CORPORATION OF FLORIDA, INC., ECKERD CORPORATION,

Defendants.

ORDER

This matter comes before the Court on Defendant Eckerd Corporation's Motion for Final Summary Judgment (Teblum Doc. # 656), Memorandum in Support (Teblum Doc. # 657), and proposed Statement of Undisputed Facts (Teblum Doc. # 658). Plaintiffs have filed a Statement of Facts in Opposition to Eckerd Corporation's Motion for Summary Judgment (Teblum Doc. # 678) as well as Plaintiffs' Brief in Opposition to Eckerd Corporation's Motion for Summary Judgment (Teblum Doc. # 679).

In addition, in an Order dated October 7, 2005, this Court consolidated this case, *Teblum et al. v. Eckerd Corporation* 2:03-cv-495-33DNF, with the case of *Rodrique et al. v. Eckerd Corporation* 2:03-cv-519-FtM-33SPC for the purpose of summary judgment only.[1] Therefore, also before the Court

[1] It should also be noted that on February 2, 2004, this Court consolidated the case of Edward J. Dimmerling 2-03-cv-673-FtM-29DNF with

are the followingmotions pending in the Rodrique case: Defendant Eckerd's Motion for Final Summary Judgment (Rodrique Doc. # 189) and Memorandum in Support (Rodrique Doc. # 190). Plaintiff, Martin Schaefer, filed a response in opposition to Eckerd's Motion for summary judgment (Rodrique Doc. # 229) as well as Plaintiff Martin Schaefer's Statement of Facts in Opposition to Defendant Eckerd Corporation's Motion for Summary Judgment (Rodrique Doc. # 230).[2]

In addition, this Court has considered motions to strike affidavits and responses thereto filed in both the Rodrique case (Rodrique Doc. # 240) and Teblum case (Teblum Doc. # 687). Upon due consideration, the Court GRANTS the motions to strike.[3]

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the Teblum action. Dimmerling remains a named Plaintiff in the Teblum action.

[2] The Court has also considered various replies as well as other documents submitted by the parties.

[3] Defendant's motion to strike the affidavit of Martin Schaefer (Rodrique Doc. # 240) and motion to strike the affidavits of Edward Dimmerling, Joyce Brindle, Lance Teblum, Nancy Civitarese and Brandon Myers (Teblum Doc. # 687) are based on the arguments that the affidavits were filed in violation of Federal Rule of Civil Procedure 56(e) because such affidavits contain hearsay and legal analysis, without the personal knowledge of the affiants. Rule 56(e) states in pertinent part that "affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Here, each affidavit is replete with conclusory, self-serving legal analysis. The affidavits do not state that they were made with personal knowledge, and in reading each affidavit, the Court determines that the mandated "personal knowledge" for filing affidavits in summary judgment proceedings was absent. For example, during Plaintiff Civitarese's deposition, she repeated that she did not remember much of her employment with Eckerd, and did not remember the FWW method of compensation. (Teblum Doc. # 659-50 at 7-10).In her twelve-page affidavit, however, she discusses the required elements of a valid section

Having carefully considered the pleadings, answers to interrogatories, depositions, and other submissions of the parties, as well as the *amicus* brief of the Florida Retail Federation (Rodrique Doc. # 214), this Court determines that Defendant Eckerd Corporation's Motions for Summary Judgment in both the Teblum case and Rodrique case should be DENIED.

I. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on

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778.114 FWW plan and makes detailed arguments as why Defendant's plan was illegal, including mathematical examples. For example, Civitarese's affidavit, along with the other affidavits at issue, stated, "If Eckerd had established these basic material facts and provided them to me along with its FWWA, I would have been able to determine whether Eckerd's actual weekly payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary agreement (§ 778.114(c)). However, Eckerd and I never reached an understanding concerning most of these compensation elements." (Doc. # 687-3 at 3) (internal citations omitted).

In addition, although each affidavit does contain some limited factual information which meets the requirements of Rule 56(e), such as the starting dates for each Plaintiff's employment with Defendant, it is not necessary for this Court to separate the wheat from the chaff. Each of the named Plaintiffs has been deposed. The deposition testimony for each named Plaintiff provides the same factual information as the affidavit testimony. The Court loses no essential factual information by striking the affidavits. Accordingly, the Court GRANTS that motions to strike affidavits filed in both the Rodrique and Teblum cases.

In addition, Plaintiffs and Defendant in both the Teblum and Rodrique case have moved for sanctions with regards to the motions to strike affidavits. Specifically, Defendant argues that Plaintiffs submitted the affidavits in bad faith. *See* Rule 56(g),Fed.R.Civ.P. Though the Court has stricken the affidavits in question, the Court finds that the affidavits in question do not rise to the level of bad faith. All requests for sanctions regarding the affidavits are DENIED.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 11th Cir. 996) (citing *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 18 (11th Cir. 1993)). A fact is material if it may affect the utcome of the suit under the governing law. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing the court, by reference to materials n file, that there are no genuine issues of material fact that hould be decided at trial. *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986))."When a moving party has ischarged its burden, the non-moving party must then 'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-94 (11th Cir. 1995) (citing *Celotex*, 477 U.S. at 324).

If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, the court should not grant summary judg-

ment. *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988) (citing *Augusta Iron & Steel Works, Inc. v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988)). However, if non-movant's response consists of nothing "mere than a repetition of his conclusional allegations," summary judgment is not only proper, but required. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982).

II. BACKGROUND

Plaintiffs in the Teblum action filed their complaint in state court on July 15, 2003. Defendant removed, and Plaintiffs' complaint was filed in this Court on August 27, 2003. Plaintiffs in the Rodrique case filed their complaint in state court on August 19, 2003. Defendant removed, and Plaintiffs' complaint was filed in this Court on September 9, 2003.

Plaintiffs in the Teblum case and the Rodrique case seek redress for alleged violations of the wage and overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* Plaintiffs in the Teblum case are current or former photo-lab supervisors or photo-lab managers for Eckerd Corporation. Plaintiffs in the Rodrique case are current or former first assistant managers for Eckerd Corporation. Both the Teblum action and the Rodrique action are 18 U.S.C. 216(b) collective "opt-in" actions, rather than class actions. In the Rodrique case, one named Plaintiff, Martin Schaefer, represents the 2,607 Eckerd first assistant managers who have opted into the suit. In the Teblum case, five named Plaintiffs, Lance Teblum, Bernadette Teblum, Joyce Brindle, Nancy Civitarese, and Edward Dimmerling, represent the 2,089 photo-lab supervisors and photo-lab managers who have opted into the suit.[4]

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[4] Two additional named Plaintiffs were previously a part of the present actions. Delice Rodrique was a named Plaintiff in the Rodrique action until March 8, 2005, when she filed a stipulation of dismissal of her claim.

III. ANALYSIS

Plaintiff's FLSA Claims

The FLSA, 29 U.S.C. §§ 206(a), 207(a), sets the minimum, wage and mandates that a premium be paid for overtime work.[5] As will be discussed later, the Department of Labor has provided alternative ways in which employers may meet the overtime requirements of the FLSA. The Fluctuating Work Week ("FWW") method of compensation is one system that employers may utilize to meet the FLSA's overtime premium requirements. The FWW has been codified at 29 C.F.R. § 778.114.

In both the Teblum and Rodrique actions, Plaintiffs were compensated using the FWW method of compensation. Under the FWW, employees receive a weekly salary calculated on the basis of 40 hours of work per week plus additional half time for all hours worked in excess of 40 hours per week. Perhaps the most distinguishing feature of FWW is that, under FWW, employees are compensated for overtime (hours over 40 per week) at a rate of one half times

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On March 9, 2005, this Court entered an Order dismissing Plaintiff Rodrique from the action. (Rodrique Docs. # 164-185). Thus, Schaefer stands as the only named Plaintiff in the Rodrique action.

In addition, Rhonda Kline was a named Plaintiff in the Teblum action until April 22, 2005, when this Court dismissed Rhonda Kline's claims pursuant to Rule 37(b) (2) (C), Fed.R.Civ.P., due to Kline's refusal to be deposed. (Teblum Docs. # 652, 666).

[5] 29 U.S.C. § 207(a) (1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

regular rate of pay, rather than one and one half times the regular rate of pay. The Eleventh Circuit has explained the FWW as follows:

> The fluctuating workweek method of payment allows an employee whose hours fluctuate from week to week to be compensated at a fixed amount per week as straight-time pay irrespective of the number-few or many-of hours worked. Payment for overtime hours under this method is at one-half time regular-rate instead of the standard one and one-half time rate because the straight-time rate already includes compensation for all hours worked.

Davis v. Friendly Express, Inc., 2003 WL 21488682, at *1 (11th Cir. 2003) (table).

As pointed out in *Davis*, "The mathematics of this payment structure means 'the more the employee works and the more overtime the employee logs, the less he or she is paid for each additional hour of overtime.'" *Id.* (citing *Monahan v. County of Chesterfield, Va.*, 95 F.3d 1263, 1280 (4th Cir. 1996).

In this case, no Plaintiff has alleged that the FWW is illegal, and no Plaintiff challenges the legitimacy of the FWW. It is not disputed that the FWW is a lawful method of compensation.[5] Rather, the Plaintiffs assert that Defendant has misapplied the FWW, and has failed to comply with the requirements of the Eleventh Circuit and 29 C.F.R. § 778.114 in implementing Defendant's FWW plan.

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[5] Plaintiffs in both the Rodrique and Teblum cases have reaffirmed this statement, for example as stated in Plaintiffs' brief in opposition to Defendant's motion for summary judgment in the Teblum case, Plaintiffs state: "All parties agree that the fluctuating workweek formula of pre-paying employees' overtime at the regular hourly rate, leaving only the overtime to be paid at one-half the regular rate, is lawful. *See*, § 778.114." (Teblum Doc. # 689 at 3-4).

The FWW is described in detail in Davis and in 29 C.F.R. § 778.114(a).

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29 C.F.R. § 778.114 states in pertinent part:

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b)The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $ 5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours

In addition, as correctly explained by Defendant, pursuant to the relevant Department of Labor regulations and case law, an employer may pay overtime in accordance with the FWW so long as: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary which remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employer and the employee have a clear mutual understanding that the employer will pay the employee a fixed salary regardless of the number of hours worked; and (5) the employee receives a fifty percent (SO%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week. 29 C.F.R. § 778.114; *see also Davis*, 2003 WL 21488682, at *1; *O'Brien v. Town of Agawam*, 350 F.3d 279, 288 (1st Cir. 2003); *Griffin v. Wake County*, 142 F.3d 712, 716 (4th Cir. 1998).

Although Plaintiffs have launched a multifaceted assault on Defendant's FWW plan, the focus of this suit remains on the following of Plaintiffs' allegations: Defendant's application of the FWW abused the FLSA standards for payment of overtime and straight time, and Defendant manipulated the FWW system with accounting techniques which resulted in unlawful failure to properly compensate Plaintiffs for overtime.

The named Plaintiffs and all individuals similarly situated seek injunctive and declaratory relief, compensation and

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worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

credit for all uncompensated work, liquidated and/or other damages and attorney's fees and costs.[8] In addition, Plaintiffs assert that Eckerd's alleged violations of the FLSA were willful, invoking the FLSA's three year statute of limitations pursuant to 29 U.S.C. § 255(a) and requiring an award of liquidated damages in an amount two times the compensatory award pursuant to 29 U.S.C. § 260. (Teblum Doc. # 693-1 at 3).

Although there is a split in the circuits on the issue of whether Plaintiff or Defendant bears the burden of proof under 29 C.F.R. § 788.114, the Eleventh Circuit has held that in cases such as this one, Plaintiffs bear the burden of proof. *Davis*, 2003 WL 21488682, at n. 4 ("Generally, a FLSA Plaintiff carries the burden of proving all elements of a FLSA claim. When, however, an employer relies on an exemption from a FLSA requirement, the employer generally bears the burden of showing that the exemption applies. As the Fifth Circuit concluded, the fluctuating workweek method is an alternative means of complying with the overtime provisions of FLSA, it is no exemption from those provisions."). Thus, Plaintiffs, as the challengers of the legitimacy of Defendant's FWW plan, must demonstrate that Defendant failed to comply with the terms of 29 C.F.R. § 778.114, the regulation that governs the application of the FWW method of compensation.

A. Rodrique Case

This Court will address Eckerd's Motion for Summary Judgment in the Rodrique case first. In Rodrique, Plaintiff Martin Schaefer is the only named Plaintiff and is the representative Plaintiff for all similarly situated Plaintiffs.

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[8] It should be noted that in July 2004, Eckerd sold all of its retail stores and the subsequent purchasers either immediately, or after a brief period, discarded Eckerd's fluctuating workweek method of compensation. (Rodrique Doc. # 230 at 15).

Schaefer worked for Defendant from March 26, 2001 through October 2002. (Rodrique Doc. # 190 at 2). At the outset it must be noted that, because Plaintiff Schaefer is the named Plaintiff in this action, the manner in which his case is decided will determine the fates of the numerous opt-in Plaintiffs in the Rodrique case. *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001) (plaintiffs who "opt in" to a collective action under 29 U.S.C. § 216(b) by filing consent forms are considered class members and are bound by the outcome of the litigation).[9] In addition, in the FLSA collective action case of *Prickett v. DeKalb County*, 349 F.3d 1294, 1297-1298 (11th Cir. 2003), *cert. denied*, 542 U.S. 919 (2004), the Eleventh Circuit construed a consent form not unlike the form signed by all opt-in Plaintiffs in these cases, and determined that the adjudication of the named plaintiff's claims decided the claims of the opt-in plaintiffs.

This Court will now proceed to analyze the claims of Plaintiff Schaefer, the sole representative Plaintiff in the Rodrique action.

1. Fluctuating Hours

The first requirement of a valid FWW plan is that it must apply to employees whose hours fluctuate from week to

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[9] In both the Rodrique and Teblum cases, the consent forms signed by all opt-in Plaintiffs contained the following language:

By my signature below, I hereby authorize the filing and prosecution of the above-styled action in my name and on my behalf by the above representative Plaintiffs and designate the class representatives as my agents to make decisions on my behalf concerning the litigation, the method and manner of conducting this litigation, the entering of an agreement with Plaintiffs' counsel concerning attorneys' fees and costs, and all other matters pertaining to this lawsuit. I certify that to the best of my knowledge: (1) I have worked for Eckerd in the last three years; (2) During those three years, worked in excess of forty hours; (3) During those three years, I did not receive overtime pay at time and one half.

week. 29 C.F.R. § 778.114(a). In this case, the uncontroverted evidence contained in Plaintiff Schaefer's payroll records demonstrates that Plaintiff Schaefer's hours did fluctuate from week to week. (Rodrique Doc. # 191-4 at 16). Plaintiffs do not argue that Schaefer's hours did not fluctuate from week to week; however, Plaintiffs contend that Eckerd's plan violated the spirit of the FWW because it required its employees to work a minimum of 50 hours a week.[10] Schaefer's "fluctuating" hours generally fluctuated only above forty hours per week. However, Plaintiff Schaefer did utilize vacation, holiday, sick, and personal time, which sometimes caused Plaintiff Schaefer to work less than a forty-hour work week. (Rodrique Docs. # 245 at 14 n. 8; 191-4 at p. 26).

Plaintiffs contend that because Defendant required its employees to work a maximum of fifty hours a week, Defendant should not be permitted to take advantage of the FWW plan.[11]

The court in *Evans v. Lowe's Home Centers, Inc.*, No. 3:CV-03-0438, 2004 U.S. Dist. LEXIS 15716, at *13-14 (M.D. Pa. June 17, 2004), addressed arguments similar to those now raised concerning employees being required to work over 40 hours every week; however, the court concluded that no authority existed for the plaintiff's position.[12]

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[10] The fact that Defendant required its employees to work 50 hours per week as a standard work week is not contested.

[11] In *Condo v. Sysco Corp.*, 1 F.3d 599, 602 (7th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994), the court upheld a defendant's application of the FWW method of compensation to an employee who worked at least 40 hours per week every week. In *Condo*, it was only the amount of overtime that varied, and the court specifically noted that there was never a week when the plaintiff employee worked less than 40 hours. In the present case, Plaintiff Schaefer stated in his deposition that he took a week-long vacation. (Rodrique Doc. # 191-3 at p. 26).

[12] The court explained:

> There is appeal to the argument that when no employee ever works less than forty hours, the fluctuating work week method should not apply. This starts with the Congressional purpose expressed in 29

In this case, the Court has carefully scrutinized the law of the Eleventh Circuit and the regulations of the Department of Labor and, similar to the court in Condo, finds no binding precedent requiring a ruling in favor of Plaintiffs on this issue.

Accordingly, because Plaintiffs and Defendant agree that Plaintiff Schaefer worked hours which fluctuated from week to week, there is no material issue of fact as to the first FWW requirement.

2. Fixed Salary

The second requirement of a valid FWW is that it must be applied to employees who receive a fixed salary regardless of the number of hours worked. 29 C.F.R. § 778.114(a).

> U.S.C. § 207 that hours worked in excess of forty requires [sic] overtime pay at one and one-half times the hourly rate. The Labor Department promulgated a regulation which sought to cover situations where employees worked fluctuating hours, that is, work-weeks that fluctuated between more that forty hours and less than forty hours. In that type of situation, the Labor Department said that an employer *may* pay an employee a salary and overtime for any hours worked in excess of forty. The argument continues that if an employer pays a salary to employees who never works [sic] less than forty hours, then the methodology should not apply because it allows the circumvention of the time and one-half provisions in 29 U.S.C. 207. . . . [However] [n]either the language of 29 C.F.R. 778.114(a) supports this point of view, nor does the existing authority. *See Condo v. Sysco Corp.*, 1 F.3d 599, 603 (7th Cir. 1993) (noting that each requirement of 778.114 was satisfied because plaintiff worked fluctuating hours, although he never worked fewer than forty hours per week); *Flood v. New Hanover County*, 125 F.3d 249, 253 (4th Cir. 1997) (finding that employees hours fluctuated for purposes of section 778.114 even though they worked pursuant to a fixed schedule, the number of hours varied from week to week)); *Griffin v. Wake County*, 142 f.3d 712, 715 (4th Cir. 1998) (finding that work hours must fluctuate and does not require an unpredicted schedule)).

Evans, 2004 U.S. Dist. Lexis 15716, at *12-14.

In this case, Schaefer's deposition testimony confirms that he did receive a fixed weekly salary of $460.00 per week from his start date of April 2001 until September 8, 2002, when his salary was increased to $469.00 per week. (Rodrique Doc. # 191-3 a 16). Plaintiff's employment with Defendant ended in October 2002. (Rodrique Doc. # 191-3 at 10). It is apparent that Defendant provided Plaintiff Schaefer with a constant weekly salary, which is one of the primary purposes of the FWW.[13]

Therefore, the second element of a valid FWW is met, and there is no issue of fact to be determined with regard to whether Plaintiff received a fixed weekly base salary.

3. The Fixed Base Salary Remains Above Minimum Wage

The third requirement of a valid FWW is that the fixed base wage is sufficient to provide compensation at a regular rate not less than the legal minimum wage. In this case, it is not disputed that Plaintiff Schaefer's weekly salary never dropped below minimum wage. Plaintiff's payrolls evidence the fact that Plaintiff's pay never fell below $5.15 per hour, which is the minimum wage. 29 U.S.C. § 206(a)(1).

4. Mutual Understanding

The applicable regulation provides that proper FWW agreements must be based upon a "clear and mutual understanding" that the employer will pay the employee a fixed salary regardless of the number of hours worked. 29 C.F.R. § 778.114. The Eleventh Circuit has further described this required level of understanding in the *Davis* case. 2003 WL 21488682, at *2.

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[13] As explained by the court in *Lance v. Scotts Co.*, No. 04-5270, 2005 U.S. Dist. LEXIS 14949, at *2 (N.D. Ill. July 21, 2005), "In theory, the FWW method is beneficial to both the employers and the employees, because it provides a measure of financial predictability and uniformity."

In *Davis*, convenience store managers paid pursuant to the FWW argued that the FWW should not apply to them because they did not have a clear and mutual understanding with their employer regarding how they were paid. *Id.* The District Court held that a clear and mutual understanding existed as a matter of law because the employees' weekly pay stubs showed the manner in which employees were paid under the FWW. The Eleventh Circuit affirmed, and added that "Plaintiffs 'received a regular lesson-in the form of their paychecks-about how the fluctuating workweek plan operates.'" *Davis*, 2003 WL 21488682, at *2 (quoting *Griffin*, 142 F.3d at 716-717). The Eleventh Circuit further noted, "While Plaintiffs claim confusion existed about how actual calculations were made, that claim casts no shadow on the underlying understanding that the fixed salary constituted compensation (apart from the one-half overtime premium) for all hours worked in a workweek, whatever their number." *Davis*, 2003 WL 21488682, at *2.[14]

As in the *Davis* case, Plaintiff Schaefer in this case was educated about the FWW by his pay stubs. In addition, Schaefer's statements offered at his January 29, 2005 deposition support a finding that a clear and mutual understanding concerning the FWW existed between Plaintiff Schaefer and Defendant:

Q. Now, when you were hired as an assistant manager, were you advised as to how you would be paid?

A. Yes.

Q. All right. And do you recall who had advised you how you would be paid?

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[14] The Court in *English v. Pharmerica Drug Systems, Inc.*, 8-04-cv-471-T-26-EAJ, at *9 (M.D. Fla. August 27, 2004) followed a similar reasoning and stated, "Given the law applicable to fluctuating workweeks, however, it is irrelevant that Plaintiff objected to his being placed on a straight salary for varying hours. Plaintiff impliedly understood the agreement by continuing to work and receive the same pay check week after week."

A. There was a lady who was the new hire specialist. I do not know her function, but she's the one that gave me the paperwork to sign.

Q. Okay. And by paperwork to sign, what do you mean?

A. The application and—

Q. Oh, okay.

A. —and the consent forms I needed to sign.

Q. * * * Did she tell you how you would be paid as an assistant manager?

A. Yes.

Q. And what were you told?

A. That there would be a base salary and then a fluctuating salary for hours over 40.

(Rodrique Doc. # 191-3 at pp. 19-20).

* * *

Q. All right. And was it your understanding when you began working as an assistant manager that you were to receive a base salary for the 40 hours, and then for all hours over 40 you would receive a fluctuating work week overtime?

A. Yes.

Q. Okay. And then the base salary that you understood you would receive were the numbers that we went over earlier on [Bates stamped] page 743 of Exhibit 1, which was $460 base salary a week and then eventually leading up to $469 a week?

A. Yes.

Q. All right. And did you understand that when you worked in excess of 40 hours that your overtime rate would be calculated by dividing the base salary by the total number of hours worked and then taking a half time of that effective hourly rate times the number of hours over 40?

* * *

Q. Okay. Did you understand you would be paid that way?

A. Yes.

Q. Okay. In other words, if you worked—let's say your base salary was $460 and you worked 50 hours in one week, you understood that you would divide 460 by 50 and get an hourly rate, and then you would multiply that hourly rate times one half times the number of overtime hours to get your fluctuating work week overtime?

A. The question was did I understand that?

Q. Well, did you know that's how you were being paid? A. Yes, sir. They called it Chinese overtime.

(*Id.* at pp. 21-22).

Schaefer's deposition testimony demonstrates that a clear and mutual understanding existed between Schaefer and Defendant.

a. Maximum Number of Hours

In addition to claiming that Plaintiff Schaefer did not understand the FWW method of compensation, Plaintiffs assert that there could be no clear and mutual understanding between Plaintiffs and Defendant because Defendant failed to tell the employees the maximum number of hours that such employees can be called upon to work in a work week or other period of time. Plaintiffs have failed to cite any binding precedent for the proposition that employees must know the maximum number of hours that they will be called upon to work.

Plaintiff has cited *Bumpus v. Continental Banking Co.*, 124 F.2d 549 (6th Cir. 1941) and *Overnight Motor Transportation Company v. Missel*, 316 U.S. 572, 581 (1942) in support of its argument. As stated by Defendant (Rodrique Doc. # 250-1), the case of *Bumpus*, 124 F.2d 549, is factually inapposite to this case and not binding.[15] Further, the Supreme Court's

[15] *Bumpus* was handed down before the Supreme Court first discussed the FWW in *Missel*. Both cases were decided before the Department of Labor issued 29 C.F.R. § 778.114.

proclamation in *Missel*, which follows, does not control this case:

> It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law.

316 U.S. 572, 581 (1942).

This Court notes that *Missel* was decided before the Department of Labor issued its regulations on the FWW. While the Supreme Court may have determined that an employment contact similar to a modern-day FWW plan was deficient because it did not require a limit on the hours the employee could have been required to work for the agreed wage, the Court in *Missel* was not discussing an FWW plan as regulated by the Department of Labor's regulations, with the other protections to the worker the FWW affords.

Importantly, the Court in *Missel*, in discussing a fluctuating work week plan, described a compensation plan with a weekly salary that remained fixed, even though the number of hours worked per week varied, and there was no provision for overtime pay, as the unchanging weekly salary contemplated overtime pay. Such a plan is different from the FWW plan described in the Department of Labor's regulations. it is easy to see why the Supreme Court emphasized the importance of a maximum number of hours to be worked per week, as the employees contemplated by the Court received the same amount of pay per pay period, no matter how many

hours they were asked to work, and no overtime premiums were paid.

Thus, Plaintiff's argument that Defendant's plans were deficient due to a lack of mutual understanding must fail. This Court adopts the statement of the Fourth Circuit in *Griffin*, 142 F.3d at 716, which the Eleventh Circuit cited with approval in *Davis*, 2003 WL 21488682, at *2. The *Griffin* court held that the clear and mutual understanding prong of Section 778.114 "only requires employees to understand the essential feature of the fluctuating workweek plan--that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period." 142 F.3d at 716 (internal citation omitted).

Further, it should be noted that it is not this Court's role to read into the Department of Labor's regulations requirements that are not present. In fact, *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-843 (1984), mandates that this Court defer to the administrative regulations unless there is some showing that such regulations contradict Congress's intent in creating the underlying code provision, which the regulation is said to interpret.[16]

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[16] Specifically, the Supreme Court in *Chevron*, ruled:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the

The record supports Defendant's position that Plaintiff and Defendant agreed that Defendant would pay Plaintiff a fixed salary regardless of the number of hours worked. No factual dispute exists.

5. 50% Overtime Premium

The final element of a valid FWW is that the employee must receive a SO% overtime bonus for hours worked over forty in addition to the fixed weekly salary.

Plaintiffs assert that Defendant violated the overtime standards of the FLSA (1) by adding nonproductive time to the hours actually worked by the employee to arrive at the rate of pay (which, in turn is divided by two to yield the overtime rate) and (2) in similarly adding bonuses to the employee's hours worked to arrive at the sum that is divided by two in order to yield the overtime rate.[17]

a. Nonproductive Time

Plaintiffs have asserted their arguments concerning non-productive time in two ways. First, Plaintiffs argue that Plaintiff Schaefer was not properly paid a fixed weekly salary for hours worked because Defendant "deducted time from the assistant managers' non-productive [time] ('NPT') 'bank' (i.e. holiday, sick, or vacation) when the employee performed no actual work." (Rodrique Doc. # 190 at 9).

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court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-843.

[17] In addition, Plaintiffs' arguments concerning errors in computing overtime when various bonuses were involved do not pertain to Plaintiff Schaefer. It is undisputed that Plaintiff Schaefer did not receive any bonuses during his employment with Eckerd as a first assistant manger (the time in question for this suit). During Schaefer's deposition, he was asked, "As an assistant manager, did you ever receive any type of a bonus?" Plaintiff Schaefer responded: "No." (Rodrique Doc. # 191-3 P. 25).

This Court finds that Defendant's use of nonproductive time as to Plaintiff's fixed weekly salary was consistent with the governing regulation: 29 C.F.R. § 778.114. Defendant's employees were paid as though they had worked on holidays, vacations, and sick days.

This Court agrees with Defendant that an employer does not run afoul of 29 C.F.R. § 778.114 simply by making deductions from an FWW employee's nonproductive time bank for hours an employee does not actually work so long as the employee receives the same weekly base salary. *See Aiken v. County of Hampton*, 172 F.3d 43 (Table), 1998 WL 957458 (4th Cir. 1998), at *4 (county did not violate FWW "by deducting time from an employee's leave bank when the employee misses work.").

Further, the Fourth Circuit's opinion in *Griffin* addressed a similar legal issue in detail:

> Wake County [the defendant] has voluntarily provided its EMTs [the plaintiffs] with the extra benefit of paid vacation and sick leave. The EMTs now claim that the County violates federal law when it requires its employees to draw down their accrued leave or vacation balances when they exercise this benefit. Unlike deductions from base pay, such deductions from leave simply do not constitute a violation of section 778.114. To countenance the EMTs' claim to the contrary would beg the question how, if at all, any system of earned vacation time is to operate if an employer may not deduct from it when the employee takes a vacation.

Griffin, 142 F.3d at 718.

The second argument set forth by Plaintiffs concerning nonproductive time presents a more concrete legal challenge. Plaintiffs argue that the Defendant violated the FLSA not when Defendant took hours from employees NPT banks, but

when Defendant calculated employees' overtime premiums by using NPT in the equation which computed overtime pay.

Specifically, Plaintiffs argue that Defendant violated the FLSA when Defendant utilized NPT to off-set hours not worked by employees, and for this proposition, Plaintiffs cite 29 C.F.R. § 778.218(a), which states:

> Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments may be excluded from the regular rate of pay under section 7(e)(2) of the Act and, for the same reason, no part of such payments may be credited toward overtime compensation due under the Act.

(Emphasis added).

The above regulation makes clear that payments made for periods of time when the employee is not working due to illness, a vacation, or a holiday are not made as compensation for hours worked, and therefore, cannot be "credited" toward overtime compensation. This Court interprets this regulation to mean that employers may not use pay for sick, holiday, and vacation time as payments for an employee's overtime work.[18]

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[18] This Court has studied the opinion in *Duplessis v. Delta Gas, Inc.*, 640 F. Supp. 891, 896-897 (S.D. La. 1986), which evaluated the issue of whether an employer could avoid paying overtime compensation due to its employees because such employer had paid the employees for non-productive time. The *Duplessis* court's discussion of this issue provides guidance to this Court in its analysis of the nonproductive time issue at hand:

> Defendants seek a credit against plaintiffs' award of overtime compensation for the extra compensation paid for non-productive time

Next, Plaintiffs argue that Defendant illegally to "required a minimum number of workweek hours (50) and docked an employee's nonproductive time for the difference between the employee's *scheduled time* (which generally was the required 50 hour workweeks or more) and the 40 hour minimum workweek. (Teblum Doc. # 697 at 29). Plaintiff continues its discussion as follows: "Eckerd's nonproductive time-docking system was thus developed not to maintain the *quid pro quo* with respect to vacation, sick time, or holiday time utilized by the employee, but instead, was used as a payment device designed to avoid paying its employees overtime at the regular time and one-half rate." (*Id.*)

The Court finds an example provided in the Teblum case, of an FWW employee with a base weekly salary of $400.00 to be illustrative of Plaintiffs' argument:

> For example, in a 58-hour scheduled workweek where the employee actually worked only 50 hours and used

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and year end bonuses, allegedly in lieu of overtime compensation. Under section 7(h) of the FLSA, certain types of extra compensation are to be treated as overtime compensation and may be credited to the employer. These types of compensation are:

> 7(e) (5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section . . . . 7(e) (6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, holidays, or regular days of rest . . . 7(e) (7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective- bargaining agreement . . . . Where, as in this case, the payments are not themselves related to the performance of overtime, and instead are payments made for occasional periods when no work is performed and the bonus is at the sole discretion of the employer, such payments are not included in the regular rate of pay nor are such payments creditable as overtime.

(Internal citations omitted).

> eight non-productive hours for illness . . Eckerd, under its own FWW, should have paid the employees gross pay as follows:
>
> $400.00 salary 4 50 hours $8.00 per hour
>
> $8.00 per hour 4 2 = $4.00 x 10 overtime hours = $40.00 total overtime pay.
>
> $400.00 salary + $40.00 overtime pay = $440.00.
>
> Instead, Eckerd treated the employees' nonproductive time (eight hours) as if it were productive time (i.e., time worked) in order to reduce the employee's regular hourly rate and overtime hourly rate as follows:
>
> $400.00 salary 4 50 hours + 8 hours non-productive hour = $6.89 per hour.
>
> $6.89 per hour 4 2 = $3.45 per overtime hour
>
> $3.45 per overtime hour x 10 overtime hours = $34.50 overtime pay
>
> $400.00 salary + $34.50 overtime pay = $434.50
>
> In this single workweek, the employee was therefore underpaid $6.50 ($440.00-$434.50).

(Teblum Doc. # 680-5 at 1).

Contrary to Plaintiff's example above, Defendant asserts the following:

> Eckerd added the non-productive time to the *amount of hours* which initially appears to reduce the value of the half-time; however, Eckerd then applied the same half-time rate to the number of non-productive hours taken and paid the Plaintiffs in addition for those non-productive hours. The net effect, then, was to actually pay the Plaintiffs in excess of the overtime due, while the Plaintiffs' non-productive hours bank was debited, be-

> cause it came from those "accounting buckets" for accounting purposes.

(Rodrique Doc. # 250 at 14-15) (emphasis in original).

Defendant submits that it payed overtime on productive time as well as on the nonproductive time. So, in the example above, Defendant would have paid the employee for 18 hours of overtime (10 hours overtime actually worked and 8 hours nonproductive time counted as overtime hours) rather than only 10 hours, as stated in Plaintiffs' example. Therefore, Defendant would have paid the employee $62.10 in overtime for a sum of $462.10 for the week—rather than the total of $434.50, as suggested by Plaintiffs as the amount Defendant would owe if Defendant omitted non-productive time from the equation.

Defendant cites to named Plaintiff Lance Teblum's nonproductive time to demonstrate how it utilized nonproductive time. (Teblum Doc. # 702 at 14-16). Unfortunately for Defendant, the examples utilized to explain the manner in which Defendant purported to use nonproductive time contains mathematical errors. Despite the errors, the Court concludes that Defendant argues that it paid overtime on productive time and non-productive time and, therefore, it ameliorated any negative affect adding non-productive time into the regular rate may have had.

At this junction, the Court cannot escape the conclusion that a material issue of fact remains. Plaintiffs allege that the Defendant added non-productive time to the regular rate of pay, and that Defendant failed to pay overtime on the non-productive time.

Defendant, on the other hand, argues that it added non-productive time to the regular rate of pay and that it paid overtime on those hours, allegedly cancelling out any negative effect on employee pay that would be caused by adding in the nonproductive time to the regular rate.

There exists a material issue of fact on the final requirement of a valid FWW as the parties disagree on how exactly the regular rate of pay, upon which overtime is calculated, was determined, and on the issue of when and how Defendant paid overtime on nonproductive time. Accordingly, summary judgment must be denied because the manner in which overtime was compensated, the core of this FLSA case, is unquestionably disputed.

Rodrique Conclusion

Viewing all evidence in a light most favorable to Plaintiffs, the Court finds that a material issue of fact remains as to whether Defendant paid Plaintiff Schaefer a 50% overtime bonus on overtime hours, as required by the controlling Department of Labor regulation: 29 C.F.R.778.114. Accordingly, as explained above, Defendant's Motion for Summary Judgment with regards to all claims in the Rodrique case, including the claims of the 2,607 opt-in Plaintiffs is DENIED.

B. Teblum Case

The above legal discussion of the Rodrique case applies to the named Plaintiffs in the Teblum case as well. The Plaintiffs in the *Teblum et al. v. Eckerd Corp.* case are photo lab supervisors and photo lab managers, rather than first assistant managers as in the Rodrique case. It is undisputed that, at all relevant times, Defendant paid its photo lab supervisors as non-exempt employees pursuant to the FWW. Defendant has paid its photo lab managers pursuant to the FWW since June or July of 2001.

Plaintiffs raise the same arguments in the Teblum case as in the Rodrique case. As stated above, the named Plaintiffs in the Teblum action are Lance Teblum, Bernadette Teblum, Joyce Brindle, Nancy Civitarese, and Edward Dimmerling.

1. Lance Teblum

Lance Teblum became an Eckerd photo lab manager in 2001 and, at that time, was paid as an exempt salaried employee (not under FWW) at $532.00 per week. (Teblum Doc. # 693-1 at 10-11). In July 2001, Lance Teblum was transferred to Eckerd's FWW method of compensation (*Id.* at 11). Thereafter, in April 2002, Lance Teblum was eligible for, and did receive, a Lab Manager Bonus for the bonus period of January 28, 2001 through January 26, 2002. Lance Teblum was also paid an additional amount for overtime on the bonuses. (*Id.*)[19]

2. Bernadette Teblum

Plaintiff Bernadette Teblum began her employment with Defendant as a photo lab supervisor in December 1999 (Teblum Doc. # 659-41 at pp. 35-36). She received a base weekly pay of $400.00 and a premium for overtime hours pursuant to the FWW. (*Id.* at pp. 40-46, 85). She was promoted to photo lab manager in April 2000. (*Id.* at pp. 36, 76, 86). In December 2000, she quit her job. She returned to Defendant's employ in February 2001 as a "group leader," a position which paid $8.00 per hour, did not work any overtime hours, and was not compensated under FWW. (*Id.* at 37-38, 90-93). She quit her job again in June 23, 2001.

i. Statute of Limitations

Defendant argues that Bernadette Teblum's claim is barred by the FLSA's statute of limitations, which follows:

> [I]f the cause of action accrues on or after the date of the enactment of this Act [enacted May 14, 1947]--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred

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[19] The Lab Manager Bonus was coded in his payroll records as 735 EP Mgr Bonus (COP) for $202.15 and 725 EP Mgr. Bonus (Sales) for $990.00 (Teblum Doc. # 693-1 at 11).

> unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

(29 § U.S.C. 255(a))

As stated, Plaintiffs in the Teblum action filed their complaint in state court on July 15, 2003, and Defendant removed the action on August 27, 2003. Because Plaintiff Bernadette Teblum quit Defendant's employ in June 2001, Defendants suggest that the two-year statute of limitations provided in 29 U.S.C. § 255(a) has run on her claim, barring her action against Defendant. However, a three-year statute of limitations applies in actions for willful violations. In this case, Plaintiffs assert that Defendant willfully violated the terms of the FLSA. The determination of whether Defendant violated the FLSA cannot be made at this juncture. Accordingly, it would be inappropriate to preclude Bernadette Teblum's claim, as she was employed as a Photo Lab Supervisor and a Photo Lab Manager and paid pursuant to Eckerd's alleged unlawful FWW method of compensation through May of 2000, which does precede the three-year period prior to the time her suit was filed. (Teblum Doc. # 678 at 2).

3. Joyce Brindle

Plaintiff Brindle was first employed by Defendant in August 1999 as an hourly worker, she then became a photo lab supervisor and eventually, a photo lab manager. She signed two FWW Agreements (FWWA's). Her weekly salary was between $375.71 in 2000 as a photo lab supervisor and $570.12 as a photo lab manager when she left Eckerd's employ in 2003. She received a Lab Manager Bonus in April 2002 for the bonus period beginning January 28, 2001 and

ending January 26, 2002.[20] Plaintiff Brindle was paid an additional amount for overtime on the bonus.

4. Nancy Civitarese

Plaintiff Civitarese began her employment with Defendant in 2000 as a photo lab supervisor and left Defendant's employ in July 2000. She was paid pursuant to Defendant's FWW plan for the entirety of her employment.

As noted, Plaintiff Civitarese's employment ended on July 20, 2000. Similar to Plaintiff Bernadette Teblum's claims, Defendant argues that Plaintiff Civitarese's claims are time barred due to the two-year statute of limitations for FLSA claims. However, as ruled above, this Court has not determined whether it is appropriate to apply the two year or three year statute of limitations in this case, and to dismiss Plaintiff Civitarese's claims at this time would be premature.

5. Edward Dimmerling

Edward Dimmerling began his employment as a photo lab manager with Eckerd in September 2001. He worked in Pittsburgh, Pennsylvania. He was paid $400.00 per week. (Teblum Doc. # 659-20 at pp. 26-29).[21]

FWW Analysis

a. Fluctuating Hours

Plaintiffs' pay records have been filed with the Court as exhibits to James Sidman's declaration. The record supports that each of the named Plaintiffs worked hours which

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[20] The Lab Manager Bonus was coded in her payroll records as 735 EP Mgr Bonus (COP) for $1,549.48 (Teblum Doc. # 693-1 at 12).

[21] Plaintiff Dimmerling complained at his deposition that he was not paid the weekly base rate that he signed up for and agreed to: $550.00. He states that the base pay he received was, instead, $400.00. It should be noted that this suit does not concern this discrepancy. (Teblum Doc. # 659-20 at pp. 19-29).

fluctuated from week to week. Notably, Plaintiffs never asserted that their hours did not fluctuate. Instead, Plaintiffs argue that Defendant should not be entitled to utilize the FWW method of payment because Plaintiffs worked at least fifty hours a week, and Defendant did not inform Plaintiffs of the number of hours Plaintiffs were asked to work each week. As discussed in the Court's analysis of the Rodrique case, this Court does not see eye to eye with Plaintiffs on these issues. The evidence shows that the three remaining named Plaintiffs' hours fluctuated from week to week. Accordingly, the first requirement of a valid FWW, fluctuating hours, is met as to each of the remaining named Plaintiffs, and no material issue of fact remains to be decided.

b. Fixed Weekly Salary

It is not materially disputed that Plaintiffs were each paid a fixed weekly salary.

c. Minimum Wage

It is not disputed that the fixed weekly salaries pay to each named Plaintiff did not fall below the statutory minimum wage of $5.15 per hour.

d. Mutual Understanding

Despite Plaintiffs' arguments that they did not fully understand the FWW method of compensation, this Court finds that each of the named Plaintiffs did have an adequate mutual understanding with Defendant that they would be paid a fixed weekly salary regardless of the number of hours worked and would receive a 50% overtime bonus for hours worked in excess of forty (40) per week.

The record contains several FWW agreements signed by the Teblum Plaintiffs.[22] The agreements signed by Lance

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[22] The agreements are filed at (Teblum Doc. # 659-9). No agreement for Plaintiff Civitarese was filed.

Teblum, Edward Dimmerling, and Joyce Brindle, for instance, stated as follows:

> As a member of the Eckerd Corporation Management team, the number of hours that you will be required to work will fluctuate from week to week. You will receive a weekly base salary representing straight time pay for all hours worked (whether greater or fewer than 40 hours) during the week. In compliance with the Fair Labor Standards Act, you will also receive additional pay for all hours worked over 40 during the workweek. All time worked must be recorded on a time sheet and reported for payroll purposes.

In addition to the FWW agreements signed by the majority of the Plaintiffs, the record contains deposition testimony from each Plaintiff, excluding Civitarese, indicating that each Plaintiff understood the manner in which they would be compensated under the FWW.[23]

During Plaintiff Lance Teblum's January 26, 2005 deposition, he stated that he did not agree with the FWW formula, but that he did understand it.[24]

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[23] Plaintiff Civitarese was deposed on March 7, 2005. She indicated that her memory is not good, and she reported having multiple heart attacks and surgery which severely impaired her memory. (Teblum Doc. # 659-50 at 7-10).

[24] Specifically, when Lance Teblum was asked, "You understand this formula?" Plaintiff responded, "Oh, yes, I do." (Teblum Doc. # 559-37 at pp. 43-44). It would be remiss to fail to mention that Lance Teblum's deposition testimony is somewhat troubling. He complains that he was not paid for some of the hours that he worked because the time clock did not function after hours, that he was forced to sign the FWW agreement "under duress," and that he was on mind-altering medications during his deposition because he is not well, has cancer, and cannot remember clearly. (*Id.* at pp. 41-44). Despite some of Plaintiff's alarming statements and Plaintiff's general tone of dissatisfaction with Defendant as an employer, Plaintiff's deposition testimony reflects that he possessed the basic understanding required by the FWW.

Plaintiff Bernadette Teblum was deposed on January 26, 2005. (Teblum Doc. # 659-41). She testified that, "we were required to work 50 hours a week. My salary was $400 for 40 hours, $440 for 50 hours is the basic, the way it was set. . . . I would get $40 for working an additional ten hours." (*Id.* at 38-39). She agreed that the extra $40 was compensation for overtime and that it was in addition to her base pay. (*Id.*)

Plaintiff Brindle testified as follows concerning her understanding of the FWW: when asked, "So you've always been working under the fluctuating workweek formula?" She answered, "Basically." Further, when asked, "And you understood that you worked under that formula?" She responded, "I didn't have a choice." Finally when asked, "but you knew that was the formula under which you were being compensated?" Plaintiff Brindle answered, "Yes." (Teblum Doc. # 659-45 at 12-13). She also acknowledged that she received a "half-time" premium on overtime hours under the FWW. (*Id.*)

Similarly, Plaintiff Dimmerling testified on March 4, 2005 that he understood the FWW. Specifically, he was asked, "Did you understand that [the FWW]?" Plaintiff responded, "I understood the mathematics of it, yes." (Teblum Doc. # 659-20 at p. 34). Plaintiff Dimmerling stated that he did not understand every aspect of the FWW, or why the FWW was implemented, but he did state in response to whether he understood the mathematics of it, "Sure. That was based on everything over 40 hours a week. If I worked overtime, they were going to pay me at half my rate." (*Id.* at p. 37).

It should be noted that Plaintiffs are not required to understand the exact mathematical equations Defendant utilized to determine Plaintiffs' pay, including the specific formulas used with regard to vacation pay, holiday pay, and bonuses. In addition, the Plaintiffs are not required to grasp the policy behind Defendant's choice to implement an FWW plan. As previously noted, Plaintiffs must only understand

that their employer will pay them a fixed salary regardless of the number of hours worked and that they will be paid a premium for overtime hours. The named Plaintiffs' deposition testimony, their signatures on FWW agreements reflecting this basic understanding, and the fact that Plaintiffs' pay stubs reflected the FWW method all demonstrate that Plaintiffs possessed the requisite understanding of the FWW described in 29 C.F.R. § 778.114.

There is no material issue of fact left to be determined on this issue.

e. 50% Overtime Premium

Defendant asserts that Plaintiffs were paid an overtime premium of 50% for all hours worked over 40 per week. Plaintiffs generally do not contest that Defendant provided overtime premiums. However, as in the Rodrique case, Plaintiffs assert that Defendant failed to pay a 50% overtime premium on "hours worked" by adding nonproductive time into the equation which computed overtime figures. This Court's determination that there is a material factual dispute on this issue in the Rodrique case holds true in the Teblum case as well. A material issue of fact exists as to Defendant's computation of its overtime premium for hours worked.

i. Bonuses

In addition, Plaintiffs assert that the manner in which Defendant provided bonuses to Plaintiffs resulted in Plaintiffs being deprived of overtime pay. Eckerd provided its competent Photo Lab Managers with a bonus, the "Express Photo Lab Manager Bonus" depending on the size and location of the store. In addition, Eckerd provided a "Shrink Gain Bonus" to employees who worked in stores in which shrink, that is, theft and loss, was adequately controlled. (Teblum Doc. # 678 at 12-13).

Lance Teblum, Edward Dimmerling and Joyce Brindle received the photo lab manager bonus, and Dimmerling received a Shrink Gain Share bonus. According to Plaintiffs, the Photo Lab Manager bonus was distributed to qualifying employees on a yearly basis. The bonus period ended in January of the calendar year and the bonus was paid in April. Similarly, the Shrink Gain Share bonus was based on the twenty-six weeks prior to each store's inventory; which were conducted on a rolling basis. (*Id.* at 13).

Plaintiffs argue that the manner in which Defendant computed overtime on bonuses resulted in a violation of 29 C.F.R. § 778.209, which states:

> (a) Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked. Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid by the employee, exclusive of the bonus. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that

week multiplied by the number of statutory overtime hours worked during the week.

(b)Allocation of bonus where bonus earnings cannot be identified with particular workweeks. If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

(Emphasis added).

Plaintiffs claim that Defendant, in violation of its obligation to pay the bonus on total hours worked, distributed the bonus amount across the number of total hours paid during the bonus period, including nonproductive hours such as sick time, vacation time, personal time, and holiday time.

Plaintiffs state that the equation used by Defendant to calculate the overtime due on bonuses, which follows, violated the above regulation:

> Formula: Bonus Amount/(productive hours paid + non-productive hours paid) = Bonus Regular Pay Rate Bonus Regular Pay Rate x Productive Hours Over 40 in a Week x½ = Overtime Premium Due.

(Teblum Doc. # 697 at 33).

Plaintiffs argue, "Defendant intentionally, systematically, and methodically reduced the dollar amount of the Bonus Hourly Rate and thus reduced the amount of additional overtime compensation paid." (Teblum Doc. # 697 at 33).

Defendant rests on its analysis of its use of nonproductive time. (Teblum Doc. # 702 at 17).

> Plaintiffs' arguments concerning bonuses are inextricably bound with Plaintiffs' arguments concerning nonproductive time.[25]

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[25] Plaintiffs point to an example from Edward Dimmerling's pay records to illustrate the argument that overtime pay on bonuses was thrown off because nonproductive time was added to the hours. Dimmerling received a Shrink Gain bonus of $600.00 for the bonus period beginning December 29, 2002 and ending on June 28, 2003. According to Plaintiffs, Mr. Dimmerling's total bonus amount was divided by the total number of hours paid during the period, 114.30 hours. Based on this calculation, his "Bonus Regular Rate" was $.52. This "Bonus Regular Rate" was then multiplied by the number of overtime hours worked by Mr. Dimmerling during the peroid (76.70), and then divided in half to determine that Mr. Dimmerling was due an additional overtime amount of $19.94. However, 64 of the 1144.30 total hours paid were for non-productive time and should not have been included according to the plain language of the regulation. Notably, if these hours were removed from the calculation, Mr. Dimmerling's "Bonus Regular Rate" would have been calculated as follows: $600.00 (1144.30 - 64 = 1080.3) = $.56. Using this increased "Bonus Regular Rate" of $.56 instead of $.52, Mr. Dimmerling would have been paid $21.47 instead of $19.94: $.56 x 76.70 = 42.95 x½ = $21.47.(Teblum Doc. 679 at 35-37).

In addition, 29 C.F.R. § 778.208 provides some discussion of bonuses, and states:

> Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except seven specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plans. These are discussed in §§ 778.211 through 778.214. Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. Bonus payments are payments made in addition to the regular earnings of an employee. For a discussion on the bonus form as an evasive bookkeeping device, see §§ 778.502 and 778.503.

Because the bonuses in question were contained in contracts with the employees, the bonuses were nondiscretionary.[26] Neither party has asserted that such bonuses were discretionary.

According to Brenda Homley, Eckerd's Corporate Representative, the Shrink Gain and Photo Lab bonuses are computed in the same manner, using a computer program entitled "peoplesoft." (Rodrique Doc. # 234-2 App. A.11 pp. 85-95).

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[26] Bonuses contained in contracts with the employees are nondiscretionary. *See, O'Brien*, 350 F.3d at 295 (correctly noting that, pursuant to 29 C.F.R. § 778.211, any bonus paid pursuant to a contract must be included in the regular rate).

Brenda Homley did provide some additional discussion of how the bonus and overtime calculations intertwined:

> Basically it [Eckerd's software] looks at the amount of hours the person worked during the bonus period. It looks at the number of hours that the participant worked during the bonus period. You take the bonus earned divided by that number of total hours, you take that and you divide that by two and multiply that times the number of overtime hours or I guess you could take times the number of overtime hours and divide it by two and then that gives you the fluctuating workweek additional overtime payment.

(Rodrique Doc. # 234-2 App. A.11 at 89).[27]

Ms. Homley's deposition testimony is vague and contradictory at times. Her statements do not clear the way for Defendant to prevail on this issue. This Court finds that there is a material factual dispute on the calculation of overtime on bonuses, as such overtime pay was affected by the manner in which Defendant used nonproductive time.

Accordingly, summary judgment must be denied on this issue as well.

Teblum Conclusion

As in the Rodrique case, a genuine issue of material fact on the issue of 50% premium for hours worked over 40 exists. In Teblum, because bonuses were paid, Defendant's use of nonproductive time presents another layer of disputed material facts.

The Court finds, as it did in the Rodrique case, that the other elements of a valid FWW are met: hours which

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[27] This Court does not fully credit Mr. Homley's testimony because, in discussions related to the bonuses, she did not know some basic information concerning the manner in which such bonuses related to overtime: the present issue.

fluctuate from week to week, fixed weekly salary, no minimum wage violations, and a clear and mutual understanding between employer and employee.

Thus, similar to the Rodrique case, the Court DENIES Defendant's motion for summary judgment as to the named Plaintiffs and thus, the 2,089 opt-in Plaintiffs.

Accordingly, it is now

ORDERED, ADJUDGED, and DECREED:

1. Defendant Eckerd Corporation's Motion for Final Summary Judgment (Teblum Doc. # 656) is DENIED.

2. Defendant Eckerd Corporation's Motion for Final Summary Judgment (Rodrique Doc. # 189) is DENIED.

3. Defendants Eckerd Corporation's Motion to Strike Affidavits (Teblum Doc. # 687) is GRANTED.

4. Defendants Eckerd Corporation' s Motion to Strike Affidavit (Rodrique Doc. # 240) is GRANTED.

5. The clerk is directed to file this Order in the case of Rodrique v. Eckerd Corporation 2-03-cv-519-FtM33-SPC, and to Close the Rodrique case.

DONE and ORDERED in Chambers in Ft. Myers, Florida, this 7th day of February, 2006.

s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies:

All Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CASE NO. 2:03-CV-495-FTM-33DNF

LANCE TEBLUM, *et al.*,

Plaintiffs,

vs.

ECKERD CORP.,

Defendant.

CASE NO. 2:03-CV-519-FTM-33SPC

DELICE RODRIQUE, et al.,

Plaintiffs,

vs.

ECKERD CORP.,

Defendant.

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE VIRGINIA M.
HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

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REPORTED BY: R. JOY STANCEL, RMR-CRR
Federal Official Court Reporter
U.S. Courthouse
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239/461-2064

* * *

[3] (Call to Order of the Court)

THE COURT: We actually have two pretrial conferences back to back. The first one that we have is, let's see, Teblum I think was the first one. Teblum versus Eckerd Corporation. Case 03-495. And let's see who we have on that case.

MR. MALAKOFF: Michael Malakoff from Pittsburgh, Pennsylvania, and Jill Bowman from Tampa, Florida.

THE COURT: Mr. Malakoff from Malakoff Doyle and Finberg?

MR. MALAKOFF: That's correct, Your Honor.

THE COURT: All right, in Pittsburgh. And you're Ms. Bowman from Tampa?

MS. BOWMAN: Yes.

THE COURT: I understand Mr. Kehoe is in trial. MS. BOWMAN: Yes, he's in a four week criminal trial in Tampa.

THE COURT: I've excused him. I think Mr. Berke had another conflict. I excused him. Yanchunis is with your firm, Ms. Davis is with your firm.

Yes, for the defendant, we have Eckerd

Corporation, is Mr.—I think the person that's been filing most of the paperwork is Ms. Dolin.

MR. MALAKOFF: I don't see her here.

THE COURT: They're on the way. Why don't you [4] just have a seat. And do we know if they're in the courthouse yet or just in the car?

MS. KELLER: They actually called and said they were running about ten minutes late, but now their ten minutes for being late has passed, so I figured they would be here.

THE COURT: We did receive a phone call to say that they were running about ten minutes late, so they have called and said that they've apparently had some issues, so we'll wait and give them a little bit of time.

(Pause)

MS. DOLIN: Your Honor, we are terribly, terribly sorry. There was a bad wildfire on Alligator Alley that started the whole problem, and then on 75, there was construction, and then everybody had to stop and watch a policeman give somebody a ticket. We're mortified.

THE COURT: Listen, I'm very sympathetic. I commute from Tampa, so I am very sympathetic to anybody who gets delayed on I-75, whether it's going north or going south. So—

MS. DOLIN: We thought we left in plenty of time. Two and a half hours, three hours, that was plenty of time. We were planning on getting lunch.

THE COURT: So much for lunch. I'm glad you're here, and sorry you had trouble with the traffic.

[5] MS. DOLIN: Thank you for being forgiving.

THE COURT: No problem whatsoever. We were just getting ready to get started, so why don't you go ahead. I think counsel for the plaintiff has stated their appearances. But why don't you go ahead and do it again for benefit of the defendants.

MS. DOLIN: Susan L. Dolin—

THE COURT: Do you know who they are?

MS. DOLIN: Yeah, we've known them for quite a while.

THE COURT: I figured you would, but just to be on the safe side.

MS. DOLIN: Susan L. Dolin, Michael Pancier, Rothstein Rosenfeldt Adler for the defense.

THE COURT: Thank you. I reviewed the pretrial stipulation which you filed, let's see, some time ago, certainly before I entered my order on the summary judgment motion. So I think you filed it back on June 7th, 2005. So it's been filed some time ago, so it was before my order on summary judgment was entered, which has resolved some of the issues that were still listed as remaining as issues for the Court to decide. So I mean, there are a couple of ways we could handle this, and I'll go through this as we continue with the pretrial conference, but it may be that you want tc supplement not the entire pretrial stipulation, because I [6] think it's certainly very valid as it is, but you may want to make some adjustments with respect to perhaps issues of law that remain to be decided, you know, things of that nature.

So let's just go through this. You've agreed jurisdictionally that this is a Fair Labor Standards Act case, that in this particular one—and again, there's the other one, the Rodrique case which is coming up next, and I guess probably as a matter that I ought to take up first is although those were consolidated for purposes of summary judgment, they have not been consolidated for purposes of trial. Is that something that either of you think is appropriate?

MS. BOWMAN: Yes, Your Honor, the plaintiffs think it would be appropriate to consolidate the cases for summary judgment. They deal with a method of compensation applied by Eckerd to all three categories of—

THE COURT: You mean for trial, for trial?

MS. BOWMAN: Yes, for trial.

THE COURT: What does the defense think?

MS. DOLIN: Your Honor, we would oppose the consolidation. One of the main reasons is that in the Schaefer case—I think it's under Rodrique's name, but Mr. Schaefer is the only plaintiff left. He, standing for his entire class, has said that he never received or was [7] eligible for any bonuses. There's a bonus issue in the Teblum matter which does not arise in the Schaefer matter.

THE COURT: In the Schaefer part of the Rodrique case?

MS. DOLIN: Right, exactly. And so there's no bonus issue in the Rodrique case at all, and I think it will just lead to serious jury confusion because this case is going to be confusing enough.

THE COURT: I'll think about it, since you're opposed to it. My inclination is to consolidate the case, but I will—and quite frankly, I have to tell you, I thought you would probably not oppose consolidation, but since you do, it's something that I need to—you know, to be fair to you, I need to think

about it. But my initial inclination was that this--these two cases should probably be consolidated for trial. Yes, sir?

MR. MALAKOFF: Your Honor, we certainly think it should be consolidated but we'd also like to explore with the Court and with the defendants for the first time—this is a very complicated case, as evidenced by the Court's opinion.

THE COURT: A 47-page order on a motion for summary judgment.

MR. MALAKOFF: Yes, it's almost unheard of. And it shows that the Court has an excellent understanding of [8] both the facts and the law. Therefore, what we would like to suggest is withdrawing our request for a Rule 38 jury trial, which would require the defendant's consent, and proceeding before the Court non-jury, and having the Court make whatever findings are necessary and entering a judgment. We, however, would like to reserve the right to reinstate the jury, if we obtain a remand on appeal, dealing with only one issue, which the Court has already dismissed, the clear mutual understanding issue.

So if the defendant agrees that the Court can make the necessary findings remaining, then that certainly eliminates any possible argument why this case should not be consolidated.

THE COURT: Let me hear from the defense on that.

MR. PANCIER: Your Honor, no, we would oppose waiving jury. But if I may also bring to the Court's attention, because the Court's order has drastically changed the composition and the nature of this case, based on our interpretation of this Court's ruling, the nature of the entire class has now changed. Essentially, the only issue, as set forth in the summary judgment, is as to—the issue as to Point 5 of the fluctuating work week elements, whether or not they were paid the half-time premium. And based on this Court's order,

the only eligible class now are those individuals who worked more than 40 hours a week and who had [9] non-productive time as a component of the overtime calculation.

Originally, when the class was certified in this case, it was a much larger class which extended to all assistant managers and Schaefer, and in the Teblum matter, it was all photo lab managers and photo lab supervisors who worked overtime. At first, they were essentially challenging the very nature of the FWW. In response to summary judgment, the plaintiffs raised the technical point that they weren't disputing the efficacy of the FWW, only as to how it was applied. And it's the defendant's position that the class now has been—is narrower and we should be provided an opportunity to now determine, from the opt-ins in both cases, to determine which ones of these now fit the new criteria, which has actually worked more than 40 hours and had NPT, or not productive time in the overtime , calculation, at which point under the standards in the 11th Circuit under Dybach, we would then have an opportunity to move for—to decertification of the class for those people who no longer qualify under the new criteria set forth in this Court's summary judgment.

THE COURT: What does the plaintiff say about that?

MR. MALAKOFF: I kind of hope at the 11th Circuit, Your Honor, it may be appropriate to decertify, in which [10] case, we would simply file a new class action with people with standing on the issues that the Court found our main plaintiffs didn't have standing. The statute would be tolled as to them and they should not be prejudiced by the fact that the named plaintiff doesn't have standing.

With respect to the issues that we understand are before the Court and which we believe we could sit down with the defendants and prepare a case stated basis, and if there's any remaining factual issues, as we said, we would be happy for the Court to decide those factual issues. With respect to the—

there's two issues that were covered by the Court's opinion. One I'll simply generically call the non-productive time issue; the other, I would simply call the bonus issue. Those are the two issues that the Court, in its opinion, reserved issue—held were factual.

I believe that the –and I could state why, but I believe that the parties could prepare a factual record that they could both submit to the Court and have those two issues resolved. There are two other issues—

THE COURT: Let me just say one thing. I mean, I'll take that under advisement, but if you can agree to something, that would be so much the better. I think maybe from what –I think from what I've heard the defendants say, they're going to object to this not being heard by a jury. Correct, for starters?

[11] MS. DOLIN: That is correct, Your Honor. We will not – we will not waive jury trial.

THE COURT: And that is obviously their right.

MR. MALAKOFF: Yes, it is, Your Honor. In looking, though, at their proposed jury instructions, and quite frankly, looking at ours that were filed on Monday, I don't know what factual disputes that there are, except those that were identified by this Court. It seems to me that as evidenced by this Court's 47-page opinion, it will take weeks to explain it to the jury. And the bottom line is, is all parties agree that the defendant's time records are accurate and speak for themselves and state exactly what the plaintiffs were paid. And if the—whether or not the jury finds those pay records show a violation or does not show a violation, quite frankly, it's irrelevant to whether there's a legal violation, which has to be determined by the Court.

So I am left with the question as to—in my mind, there's no factual issues for the jury to determine, other than perhaps the two issues that were identified by this Court.

Now, aside from those two issues, there are two other issues that this Court permitted us to present to the Court in a reply brief that were not addressed in the Court's opinion, perhaps because we never cross moved for a [12] motion for summary judgment. Those two issues, I would call simply the conversion issue, whether there was an intent when they converted from exempt to non-exempt to deprive and manipulate the pay structures so as to avoid overtime, and that was briefed in a supplemental brief before the Court. The other issue I would call the Frank issue, based on the 9th Circuit case. The defendants call it the Sampson issue, and quite frankly, the Court, based on its opinion, may view it that way. And that deals with, we believe mathematically that a 40 hour work week cannot support more than 60 hours of time, just mathematically. The defendant has taken various positions on it, but one, they don't believe it's in the case, or two, they believe if it is in the case, that the plaintiffs are wrong. But in any event, the Court should provide on the record, respectfully, its opinion on the conversion issue and the over 60 hour issue.

Again, I believe we could present it to the Court on a case stated basis, and I believe that irrespective of what a jury believed the law is or it isn't is irrelevant. And I believe that based on this Court's opinion, this Court has spent untold hours learning the facts, learning the law, and that this Court would be the best person to resolve any factual issues at this juncture of the case.

THE COURT: Well, in light of the fact that they're entitled, clearly entitled to a jury trial, what can [13] we do or what can you do in terms of making this as simple and straightforward a case for a jury? In other words, what are issues that the Court can take care of to whittle down what it is the jury has to resolve? Yes, ma'am.

MS. DOLIN: May I respond, Your Honor? Thank you. We don't believe that these issues exist anymore. Based on the

Court's summary judgment order, which was very thorough, the Court found a factual dispute.

THE COURT: I did.

MS. DOLIN: As to element number five.

THE COURT: And that was the only factual dispute that I said remained.

MS. DOLIN: Exactly. That's what's to be before the jury. Is the defendant right in its contention that the addition of the NPT, or not productive time into the—into the pay, not offsets, but is another way of paying the overtime, or is it, as they claim, something that we're trying to claim a credit for that we shouldn't be getting credit for. That's the factual issue for the jury. That's all we see left. The issue of the maximum number of hours, that was decided already. The Court did not find in their favor. That's—I'm sorry, but that's the way the order was.

THE COURT: Actually, the Court found in your favor for just about everything except for the last item, [14] where I found there was a factual dispute.

MS. DOLIN: Exactly. That's exactly right. That's the only factual dispute there is for a jury.

The defendant's suggestion would be this, we could—and what we're trying to do now is do an assessment of damages based on the only issue that's left in the case. And if we can do that, and they can do that, and we can go back to mediation, I think we might be able to give it another shot with a more realistic view this time.

THE COURT: I think that's an excellent idea.

MS. DOLIN: That's what the defendant would propose. I mean, we are ready for trial and we can go to trial. Although we have some personal issues between us, we can discuss if Your Honor needs to, but what I think would be the best thing

for all parties is to give it another shot at mediation with a realistic idea of what the issues are and what the damages would be.

THE COURT: I think that makes a lot of sense in light of my order, which I think does change things considerably, but I'll hear from the plaintiffs. What would be wrong with going back to mediation or trying to see if there's another way that this can be resolved?

MR. MALAKOFF: Your Honor, the big issues were resolved by the Court. This went from a $50 million case to probably under a million dollars. The mediator is not going [15] to be able to resolve the case, given its posture. Only the 11th Circuit's going to be able to resolve it. You know, the mediator, if it gave us a hundred percent on the two remaining issues, would be woefully insufficient, from our standpoint. So it's—it's simply postponing the date of appeal. We wanted to put it in a form where, inexpensively, the parties could finalize the record, where it's now at. If there's any factual issues, the Court could quickly resolve them, based on its prior knowledge of the case, and the parties could take an appeal.

If the Court has decided the two issues that Ms. Dolin says the Court has decided, so be it, then let the Court enter an order saying that it's considered the issues and resolved them against the plaintiff, and then those issues will no longer be in the case.

But I see nothing, in all due respect to the Court, where the issue raised in our supplemental brief, with permission of this Court, dealing with the conversion was discussed, and I don't believe the Court made any finding as to the 40/60 hour issue.

At this point, I would anticipate the Court could very well hold for the defendant on those issues, but all I'm asking the Court—I'm not purporting to argue it at all today --is is that there simply be a modification and that those issues were

considered and rejected or a [16] statement that other issues were raised and found to be meritless, or words to that effect.

In any event, to return to the initial question, the parties were not very close during the earlier days of mediation. They were very productive. They helped the parties frame the issues, which I think were evident by the briefs submitted to the Court, but at this point, there's a sea gap of difference in terms of money between the plaintiffs and the defendants and unless- and the defendants won. There's no sail left in plaintiff's—that plaintiff's have to negotiate.

THE COURT: Although you did not file a cross motion for summary judgment.

MR. MALAKOFF: No, we did not, Your Honor, but if the Court would grant us permission, I would certainly file it on those two issues at this time. Or again, we could present it to the Court on a case stated basis, have the Court and not a jury decide.

I believe that a one- to two-day trial would be necessary, at most, to decide the remaining issues. It will take weeks to educate a jury on these questions, and the bottom line is they're going to be asked to determine questions of law, which they are not able to determine.

THE COURT: I would like to take all this under advisement and just think about it, but I do think that [17] going back to mediation, under these circumstances, is an excellent idea. I understand what you're saying and how this case has changed, how you need to take an appeal, how the case is very different today than it was, you know, a couple of years ago. But simply because of that, this may be a case that can—I don't know, that perhaps can be resolved. I think at least we need to give it another shot. And if it can't be resolved, it can't be resolved, and then we'll go back and address these issues.

At a very minimum, there are a number of items that have changed on this pretrial stipulation, and with respect to the issues that remain, you've covered those for the Court, but I think it's something that it's better if you two stipulate to.

This case is not going to be tried by the Court. The defendant has requested a jury trial and I think that there are ways that if this case does go to trial, I think there are ways that you can explain things to the jury, such as these matters have already been resolved by the Court.

MS. DOLIN: In fact, we filed new jury instructions, Your Honor, E-filed them last night and sent them to the plaintiffs' counsel that does exactly that.

THE COURT: That's how you explain things. For instance, I don't know, I used to do forfeitures. You tell the jury there's been a—the defendant's been found guilty [18] of these charges, now, these are the only issues that remain. And you walk in telling them, this has already been found and so therefore, you only have to decide these matters. And that's how you narrow down the focus of the jury on those particular items.

MS. DOLIN: That's exactly what our instructions do, to the letter, if you've seen them. They were E-filed last night.

THE COURT: I'm inclined to take this off—we're on the March trial term?

MS. BOWMAN: Yes, Your Honor.

THE COURT: Is that right, Ms. Figgers, this is March?

MS. DOLIN: March 6th, I believe.

THE COURT: I'm inclined to take it off, to send you back to mediation, and I will take a look at some of these issues again. Have you—do you have a mediator? Have you used a mediator in Fort Myers, before?

MS. DOLIN: Your Honor, we used Cary Singletary up in Tampa who, as you know, has an excellent reputation. We were thinking, I would counsel with plaintiffs on this and the Court, if perhaps a magistrate judge might not be a good mediator to go before. It's just a suggestion.

THE COURT: Judge Frazier has done some mediations. He is the magistrate judge assigned to this [19] case, so I just say that as a caveat, because he is the magistrate judge. But he has done an excellent job on mediations that I have sent to him. I've sent a couple to him and he's done an outstanding job. There's a magistrate judge in Tampa that has also done an outstanding job but I've already sent a couple to her and I hate to, you know, to use her, you know, that often because she's not here in Fort Myers.

But I would highly recommend Judge Frazier. As I said, he's done an excellent job.

MS. DOLIN: That's suitable with the defendant if the plaintiff agrees.

THE COURT: I would need to check with Judge Frazier to see if that's okay with him.

MR. MALAKOFF: Your Honor, I'd simply comment that Mr. Singletary was excellent. We probably spent over 16 hours in front of him. We had slides and we had --he certainly demonstrated an awareness of the issues and the facts. I am --obviously, the Court knows what's the best direction for us to take, but I simply note that the learning curve in this case is quite high and that Mr. Singletary has already walked that path.

THE COURT: What about going back to him?

MS. DOLIN: That's fine. We don't have a disagreement. I just threw that out as a potential [20] suggestion.

THE COURT: I think--is the other case assigned to Judge Chappell? I mean, Judge Chappell, I have not sent any

mediations to her, but she also does an excellent job. So you would have your choice. I think one of these cases is a Judge Frazier case—no, they're both Judge Frazier. They would both be Judge Frazier cases. But I mean, that's a very valid point. If you spent a lot of time with one mediator, probably makes sense to continue with him.

MS. DOLIN: We have no objection to that. That's fine.

MR. MALAKOFF: Your Honor, it's one other question, and since the Court has taken this off the jury trial list, we will probably ask the Court for a 1292(b) certification. I wondered if the Court would grant us ten additional days to make that filing.

THE COURT: Yes, I will. I will grant you ten additional days.

MR. MALAKOFF: We will ask the Court to certify up its interpretation of Weisel and we will ask the Court to certify up its understanding of the clear mutual, clear understanding.

THE COURT: You will be filing that within the next ten days, you said?

MR. MALAKOFF: Well, I'm given ten days under the [21] rule.

THE COURT: You want an additional ten days?

MR. MALAKOFF: I wanted an additional ten days, to have 20 days from the date of the Court's summary judgment, which was –

THE COURT: I believe it was on Tuesday.

MR. MALAKOFF: February 7th.

THE COURT: Tuesday, February 7th.

MR. MALAKOFF: So it would be filed with this Court on or before February 27th.

THE COURT: I will go ahead and grant that. Then of course, you will file a response to that?

MS. DOLIN: Yes, Your Honor.

THE COURT: If it ends up that you need some additional time, since I've given them an additional ten days, I will grant you an additional amount of time to respond to that, as well.

MS. DOLIN: We appreciate that, Your Honor. Thank you.

MR. MALAKOFF: My one caveat is I think the Court has the power to grant that. If not, it will be filed as required. Thank you very much, Your Honor.

THE COURT: I think I do. I think I do have the jurisdiction to do that.

MS. DOLIN: You do.

[22] MR. PANCIER: Actually, it just involves amending the order to add the magic language to it and they would have to petition the 11th Circuit to see if they want to take it or not.

MS. DOLIN: The "no just reason for delay" I think is the magic language.

MR. MALAKOFF: It's a three-prong test, and you know, we will file it in the appropriate form whether it's granted or not.

THE COURT: I think that makes sense. I think this is an appropriate way to handle this. Do we want to handle the Rodrique case in the same fashion? It would seem to make sense to me.

MS. DOLIN: I would say that that's probably the best way to go.

THE COURT: Reserving whatever objections you have which you mentioned to me about Mr. Schaefer at the beginning. And his situation is different and I understand that, and recognizing that you have all of those objections reserved

for these purposes, I think it makes sense to take that case off the calendar, as well, mediate that case, as well, and then handle it in a similar fashion.

MS. DOLIN: And they can do a 1292(b) on that as well.

THE COURT: Exactly.

[23] MS. DOLIN: I definitely agree.

THE COURT: All right. So what I'm going to do, then, just so we're clear on this, I'm going to take this off, both cases off the April trial term. I'm going to send this to mediation. I probably ought to impose a time frame, but I want to do it with your consent and I want you to think about it. So why don't you consult with each other, how much time you need to mediate, so that we can then enter an order. However long you need is fine. If you need two months, that's fine. If you need one month, that's fine. Whatever you need. I'm sure that you all have been working together and will be agreeable to it.

MS. DOLIN: We've been working pretty well together. We've had our moments, but we've been working pretty well together. We have already tasked our IT guy—is that the appropriate language— to try and cull out those people that actually do fit within this class now and figure out what their damages are. So that's already being done, hopefully.

THE COURT: Okay.

MS. DOLIN: I'm assuming you guys are going to do the same thing.

THE COURT: And you will file your motion, what did I say, was that February 27th?

MR. MALAKOFF: Yes, Your Honor. I didn't mean to [24] limit myself to two issues, but it would certainly be no more than four.

THE COURT: That would be fine, by February 27th, and then if you, the defense needs an additional amount of time in addition to the ten days that you would normally get, please petition the Court and I would be certainly amenable to doing that. Would you have an objection to giving them an additional ten days?

MR. MALAKOFF: No, Your Honor.

MS. DOLIN: Thank you, Your Honor.

THE COURT: All right. Is there anything else that we need to cover today? I think hopefully this will help, and if it doesn't, if it doesn't resolve it, at least we have made some progress in terms of moving it along. Thank you for bearing with me. I'm sorry that I did not get that order out until two days before. It was, as you can see, very complicated and it took a long time.

MS. DOLIN: I have to join with Mr. Malakoff in commending the Court. It is a very complicated case and you guys really went through it and analyzed it.

THE COURT: Fortunately, I have a very astute law clerk by the name of Kelly Keller who is an excellent assistant.

MS. DOLIN: She is indeed astute.

THE COURT: I know that. I know how fortunate I [25] am. I don't take her for granted for one moment.

MS. DOLIN: It is not an easy case.

THE COURT: Thank you very much.

COURT SECURITY OFFICER: All rise, please.

(Proceedings concluded at 4:30 p.m.)

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No. 2:03-cv-496-FtM-33DNF

LANCE TEBLUM, BERNADETTE TEBLUM, JOYCE BRINDLE, f/k/a JOYCE CUNLIFFE, NANCY CIVITARESE, et. al.,
Plaintiffs,

vs.

ECKERD CORPORATION OF FLORIDA, INC., and ECKERD CORPORATION,
Defendants.

ORDER

This matter comes before the Court upon Plaintiffs' Motion for Leave to File for Partial Summary Judgment (Teblum Doc. # 745; Rodrique Doc. # 282); Plaintiffs' Motion to Amend This Court's Order of February 7, 2006 to Include a 28 U.S.C. 1292(b) Certification (Teblum Doc. # 750), and the parties' Joint Motion to Approve Settlement Agreement (Teblum Doc. # 765; Rodrique Doc. # 299).[1]

[1] This case has been consolidated with the case of *Rodrique et al. v. Eckerd Corporation* 2:03-cv-519-FTM-33SPC for the purpose of deciding summary judgment, and parallel motions have been filed in the Teblum and Rodrique cases. It should be noted that the Rodrique Plaintiffs never filed a motion equivalent to Plaintiffs' Motion to Amend This Court's Order of February 7, 2006 to Include a 28 U.S.C. § 1292(b) Certification (Teblum Doc. # 750), filed in the Teblum case. It is this Court's understanding that the Plaintiffs in the Rodrique case intended to file such a motion, but failed to do so due to oversight. This notion is supported by

Background

On February 7, 2006, this Court entered an Order that denied Defendant Eckerd Corporation's Motion for Summary Judgment. (Teblum Doc. # 735; Rodrique Doc. # 272). The Order applied to the Teblum Plaintiffs and the Rodrique Plaintiffs, including Edward Dimmerling, as these cases were consolidated for summary judgment purposes. These Fair Labor Standards Act opt-in cases included approximately 4,696 plaintiffs in all.

The Order evaluated whether Eckerd's plan for compensating employees under the Fluctuating Work Week method (FWW) complied with the FLSA. The FWW has been codified at 29 C.F.R. §778.114.[2] The summary judgment Order,

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the fact that the Rodrique Plaintiffs filed a motion for extension of time in which to file such motion (Rodrique Doc. # 284), and Defendants in the Rodrique case filed a motion for extension of time to respond to Plaintiffs' motion to amend to include a 28 U.S.C. § 1292(b) certificate. (Rodrique Doc. # 295). This Court will proceed as if such motion had been filed in both cases.

[2] The operative language of the Regulation states:

> An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for

pursuant to the Eleventh Circuit case of *Davis v. Friendly Express, Inc.*, 2003 WL 21488682, at *1 (11th Cir. 2003), stated that a valid FWW plan must meet the following five elements: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary which remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employer and the employee have a clear mutual understanding that the employer will pay the employee a fixed salary regardless of the number of hours worked; and (5) the employee receives a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week.

The Court denied Eckerd's motion for summary judgment because the Court determined that there was a material issue of fact as to whether Defendant met element (5). There is a material issue of fact as to whether Defendant paid the plaintiffs a 50% overtime bonus in addition to the fixed weekly salary because the Defendant added non-productive time (time not worked by the employee) into the equation which determined employee overtime. (Teblum Doc. # 735 at 25-29; Rodrique Doc. # 272 at 25-29).

After the Court entered the Order denying summary judgment, Plaintiffs filed both a motion for leave to file a motion for partial summary judgment and a motion to amend the

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whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

Court's summary judgment Order to include a certificate of appealability under 28 U.S.C. § 1292(b) so that the case may be appealed to the Eleventh Circuit. After full briefing on the above motions, the parties reached a partial settlement. The parties have moved the Court to approve their settlement as required by the Eleventh Circuit.

I. Joint Motion to Approve Settlement Agreement

On April 12, 2006, the parties reported that they settled all issues related to Defendant's payment of overtime. (Teblum Doc. # 764; Rodrique Doc. # 299). The parties' settlement agreement states as follows:

1. Subject to district court approval, the Defendant shall pay to the Plaintiffs in the above referenced case the amount of $156,000.00 inclusive of all alleged unpaid overtime, and liquidated damages, for a three year period (preceding the filing of the respective lawsuits) as they pertain to the issues of Eckerd's inclusion of non-productive time in its overtime calculations. The Defendant shall pay to Plaintiffs' counsel, $144,000.00 as attorneys' fees and costs as they pertain to the issues of Eckerd's inclusion of non-productive time in its overtime calculations. In the event that the district court determines that the attorneys' fee and costs should be less than $144,000.00, any remaining monies shall revert back to the Plaintiffs in the above cases pro rata.

2. The monies shall be distributed as follows within 30 days of the Court's Order approving this settlement.

    a. Each named Plaintiff remaining in this lawsuit shall be paid the sum of $1,000.00 less applicable withholding; and

b. The remaining qualified plaintiffs, who shall be defined as those Plaintiffs, named and opt-in plaintiffs, whose pay was impacted by Eckerd's inclusion of non-productive time in its overtime calculation, shall receive an equal share of $150,000.000 (and any reversion, if applicable).

3. The parties agree that this resolution shall not constitute an admission of liability by Defendant that (1 is has violated any provisions of the FLSA; 2) it has acted willfully, or 3) Plaintiffs are entitled to liquidated damages. Rather the parties agree that this is a compromise of a disputed claim for which Eckerd denies all liability.

4. The parties agree that this agreement may not be used in any proceeding or trial or to prove any alleged wrongdoing by Eckerd as to the remaining claims that may exist under the above referenced cases.

5. The parties agree that should the Plaintiffs prevail in the remaining matters not settled herein, that the Defendant is entitled to an offset as to the damages and fees which have been actually paid pursuant hereto.

6. The parties agree that the settlement proceeds payable to the qualified Plaintiffs will be distributed to them after Court approval net of applicable taxes and withholding. Within ten days of Court approval, the Plaintiffs' counsel shall provide a list of qualified plaintiffs, their last known address and social security number and the amount of proceeds to be distributed to that plaintiff.

7. The parties agree that they do not waive any claims or defenses with respect to the pending motions or any further proceedings in this matter which are available to them under law.

8. The signatories for the Plaintiffs hereby aver that they have full and complete authority to sign on behalf of the Plaintiffs and the opt-in Plaintiffs.

9. This settlement is subject to Court approval as required by law. *See Lynn's Foods*.

10. Acceptance of monies under the Agreement constitutes a complete release by qualified Plaintiffs, their heirs, successors, or assigns, of all claims pertaining to Eckerd's inclusion of nonproductive time in its overtime calculations under the fluctuating work week method including, without limitation, the calculation of bonuses and other compensation.

11. Defendant's payment of obligation shall be abated in the event an appeal is taken from the terms of this agreement whether by judgment or otherwise.

(Teblum Doc. # 764-2; Rodrique Doc. # 299-2).

The Eleventh Circuit requires district court approval of any settlements reached in FLSA cases concerning claims for back wages. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) ("When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.").

The Court finds that the settlement fairly and reasonably resolves the disputed issues in this matter and, considering all the circumstances in the case, is a reasonable compromise. Accordingly, the parties joint motion to approve the settlement agreement (Teblum Doc. # 765; Rodrique Doc. # 299) is GRANTED.

II. Plaintiffs' Motion for Leave to File Motion for Partial Summary Judgment

Plaintiffs seek an Order allowing them to file an untimely motion for partial summary judgment. (Teblum Doc. # 745; Rodrique Doc. # 282).

The Plaintiffs have had ample opportunity to assert their arguments within the parameters of a summary judgment motion and have failed to do so. The deadline for filing dispositive motions has come and gone, and it would be prejudicial to allow the tardy motion Plaintiffs seek to file at this juncture. In addition, the Court is of the opinion that allowing Plaintiffs to pursue a dispositive motion after one round of summary judgment has been completed would be unfair to Defendant, as, in the instance that the motion to file for partial summary judgment were granted, the Plaintiffs would have an unfair advantage having had the benefit of this Court's detailed ruling.

Accordingly, upon due consideration, Plaintiffs' motion for leave to file a motion for partial summary judgment is DENIED.

III. Plaintiffs' Motion to Amend Summary Judgment Order

Plaintiffs seek an order amending this Court's Order of February 7, 2006 to include a 28 U.S.C. § 1292(b) Certification.

The Supreme Court has decreed that orders denying summary judgment are not appealable. *Switz. Cheese Ass'n. Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966) ("the denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim.") *See also Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 482 (1978); *Ala. v. United States Army Corps of Eng'Rs.*, 424 F.3d 1117, 1129 (11th Cir. 2005). Each of these cases echo the firmly

held judicial policy against piecemeal appeals. This principle was well stated in *Switzerland Cheese*:

> A district judge's orders advancing a case to trial ought not be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication . . . I believe this an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future—all contrary to settled law against piecemeal appeals.

385 U.S. at 25 (citing *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 280 F.2d 800, 805 (2nd Cir. 1960) (Clark, J., dissenting).

If a trial court enters an order from which appeal is not permitted pursuant to 28 U.S.C. § 1292(a)[3], such as an order denying summary judgment, the court has the option of including a 28 U.S.C. § 1292(b) certification, which would allow the order to be appealed.[4]

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[3] 28 U.S.C. § 1292(a) defines the jurisdiction of the federal courts of appeals and lists the specific types of orders from which appeals may be taken.

[4] 28 U.S.C. § 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Even if the Court were to amend its Order denying summary judgment to include a 28 U.S.C. § 1292(b) Certificate, the Eleventh Circuit would be under no obligation to consider the appeal. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 167 (1972) (application of 28 U.S.C. § 1292(b) "subject to the judgment and discretion of the district court and the court of appeals.") *See also, McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1259 (11th Cir. 2004) ("the court of appeals has discretion to turn down a § 1292(b) appeal. And we sometimes do so. The proper division of labor between the district courts and the court of appeals and the efficiency of judicial resolution are protected by the final judgment rule, and are threatened by too expansive use of the § 1292(b) exception to it.").

Indeed, the Eleventh Circuit has enunciated a strong presumption against interlocutory appeals. *See McFarlin*, 381 F.3d at 1259 ("Because permitting piecemeal litigation is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy."); *United States v. One Parcel of Real Property*, 767 F.2d 1495, 1498 (11th Cir. 1985)(the presumption against interlocutory appeals explained in the context of the collateral order doctrine as presented in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-547 (1949)); *see also Carley v. Capital Group v. Deloitte & Touche, L.L.P.*, Civil Action File No. 1:97-CV-3183-TWT, 1999 U.S. Dist. LEXIS 1368, at *12 (N.D. Ga. January 19, 1999) (denying a motion for a 28 U.S.C. § 1292(b) certification because "exceptional circumstances are required to justify a departure from the policy of postponing appellate review until after the entry of a final judgment").

In light of the strong presumption against piecemeal appeals and because Plaintiffs have not persuaded this Court that exceptional circumstances justifying departure from the policy of postponing appellate review until after the entry of a final judgment exist, this Court, acting within its discretion, declines to amend its Order to include a 28 U.S.C. § 1292(b)

Certification. Accordingly, Plaintiffs' Motion to Amend This Court's Order of February 7, 2006 to Include a 28 U.S.C. § 1292(b) Certification (Teblum Doc. # 750) is DENIED.

Accordingly, it is now

ORDERED, ADJUDGED, and DECREED:

1. The parties' Joint Motion to Approve Settlement Agreement (Teblum Doc. # 765; Rodrique Doc. # 299) is GRANTED;

2. Plaintiffs' Motion for Leave to File for Partial Summary Judgment (Teblum Doc. # 745; Rodrique Doc. # 282) is DENIED;

3. Plaintiffs' Motion to Amend This Court's Order of February 7, 2006 to Include a 28 U.S.C. § 1292(b) Certification (Teblum Doc. # 750) is DENIED;

4. The Clerk is directed to file this Order in both the Teblum and Rodrique cases; and

5. The Clerk is directed to terminate all pending motions and deadlines and to close this case.

DONE and ORDERED in Chambers in Ft. Myers, Florida, this 28th day of April, 2006.

s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT

Copies: All counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No. 2:03-cv-495-FtM-33DNF

LANCE TEBLUM, BERNADETTE TEBLUM, JOYCE BRINDLE, f/k/a JOYCE CUNLIFFE, NANCY CIVITARESE, et. al.,
Plaintiffs,

vs.

ECKERD CORPORATION OF FLORIDA, INC., and ECKERD CORPORATION,
Defendants.

ORDER

This matter comes before the Court on Plaintiffs' Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60 (Teblum Doc. # 767; Rodrique Doc. # 301), which was filed on May 4, 2006.[1] Defendant filed its Memorandum in Opposition to the Motion for Relief from Judgment on May 17, 2006 (Teblum Doc. # 768; Rodrique Doc. # 302).

Plaintiffs seek an Order (1) vacating this Court's April 28, 2006 Order (Teblum Doc. # 766; Rodrique Doc. # 300) which, *inter alia*, closed the Teblum and Rodrique cases. Plaintiffs also seek an Order setting this case for trial on two issues described by Plaintiffs as the "60-hour" issue and the "Photo Lab Manager transition" issue.

[1] This case has been consolidated with the case of *Rodrique et al. v. Eckerd Corporation* 2:03-cv-519-FTM-33SPC for the purposes of deciding summary judgment, and parallel motions have been filed in the Teblum and Rodrique cases since the consolidation.

Background

On February 7, 2006, this Court entered an Order that denied Defendant Eckerd Corporation's Motion for Summary Judgment. (Teblum Doc. # 735; Rodrique Doc. # 272).

The Order evaluated whether Eckerd's plan for compensating employees under the Fluctuating Work Week method (FWW) complied with the FLSA. The FWW has been codified at 29 C.F.R. §778.114. The summary judgment Order, pursuant to the Eleventh Circuit case of *Davis v. Friendly Express, Inc.*, 2003 WL 21488682, at *1 (11th Cir. 2003), stated that a valid FWW plan must meet the following five elements: (1) the employee's hours fluctuate from week to week; (2) the employee receives a fixed weekly salary which remains the same regardless of the number of hours the employee works during the week; (3) the fixed amount is sufficient to provide compensation at a regular rate not less than the legal minimum wage; (4) the employer and the employee have a clear mutual understanding that the employer will pay the employee a fixed salary regardless of the number of hours worked; and (5) the employee receives a fifty percent (50%) overtime premium in addition to the fixed weekly salary for all hours worked in excess of forty (40) during the week.

The Court denied Eckerd's motion for summary judgment because the Court determined that there was a material issue of fact as to whether Defendant met element (5). There is a material issue of fact as to whether Defendant paid the plaintiffs a 50% overtime bonus in addition to the fixed weekly salary because the Defendant added non-productive time (time not worked by the employee) into the equation which determined employee overtime. (Teblum Doc. # 735 at 25-29; Rodrique Doc. # 272 at 25-29).

After the Court entered the above-described Order denying summary judgment, Plaintiffs filed both a motion for leave to file a motion for partial summary judgment (Teblum Doc.

745; Rodrique Doc. # 282) and a motion to amend the Court's summary judgment Order to include a certificate of appealability under 28 U.S.C. § 1292 (b) (Teblum Doc. # 750). In addition on April 12, 2006 the parties filed a notice of partial settlement, and on April 25, 2006, the parties jointly requested that this Court approve the settlement (Teblum Doc. # 765; Rodrique Doc. # 299).

In an order dated April 28, 2006 (Teblum Doc. # 766; Rodrique Doc. # 300) this Court denied Plaintiffs' motion for leave to file a motion for partial summary judgment and Plaintiffs' motion for a certificate of appealability. In addition, the Court's April 28, 2006 Order granted the parties' joint motion for approval of the settlement pursuant to *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982). In light of the Court's order denying summary judgment, taking into consideration the denial of Plaintiffs' motions for leave to file for partial summary judgment and for a certificate of appealability, and due to the approval of the parties' settlement, this Court closed the case. (Teblum Doc. # 766; Rodrique Doc. # 300).

Plaintiffs' Rule 60(b) (6), Fed. R. Civ. P., Motion

As stated, Plaintiffs now move pursuant to Fed. R. Civ. P. 60(b)(6), for an Order vacating this Court's April 28, 2006 Order described above.

Federal Rule of Civil Procedure 60(b) states in full:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse

> party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

For the reasons stated herein, the Court denies Plaintiffs' Rule 60(b)(6) motion. This Court's decision to deny Plaintiff's request for relief under Rule 60(b) is reviewed for abuse of discretion. *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir. 1987).

Rule 60(b)(6) is a catchall provision stating that a court may relieve a party from a judgment for any "reason justifying relief from the operation of the judgment." *Id.* The Eleventh Circuit has repeatedly held that relief under Rule 60(b)(6) should be granted only upon a showing of extraordinary circumstances. *Id.*; *Enwonwu v. Trans Union, LLC*, No. 05-13695, 2006 U.S. App. LEXIS 2301, at *11 (11th Cir. January 31, 2006); *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996). The Eleventh Circuit has further explained that

the "extraordinary circumstances" requirement, noting that "the movant must do more than show that a grant of its motion might have been warranted. The movant must demonstrate a justification for relief so compelling that the district court was required to grant the motion." *Olmstead v. Humana, Inc.*, 154 Fed. Appx. 800, 805 (11th Cir. 2005).

Plaintiffs assert that this Court should vacate its Order that, *inter alia*, closed the case because two issues remain to be decided by a jury. Specifically, Plaintiffs argue that a jury should decide whether Defendant violated the FLSA with regard to Defendant's payment of overtime for employees who worked over 60 hours in the workweek based on a 40 hour workweek. In addition, Plaintiffs argue that a jury should decide whether Defendant violated the FLSA when Defendant converted Photo Lab Managers from exempt to non-exempt status.

Defendant correctly argues that the two issues Plaintiffs suggest this Court must hear are not properly before the Court. Specifically, Defendant states:

> In sum, the Plaintiffs have prevailed on the motion for summary judgment. They then sought post hoc for leave to file their own motion for summary judgment to inject these theories separately into the case, when the Court had already ruled that the only issue for trial was the non-productive time issue. Plaintiffs' ill-timed motion was denied. It was not an abuse of discretion for this Court to have denied the Plaintiffs' motions. Simply stated, no extraordinary circumstances exist in the record which warrant relief from judgment. Thus, the Plaintiffs' motion should be denied.

(Teblum Doc. # 768 at 6; Rodrique Doc. # 302 at 6-7).

The Court agrees with Defendant's above argument. As stated in this Court's Order of April 28, 2006, "Plaintiffs have had ample opportunity to assert their arguments within the

parameters of a summary judgment motion and have failed to do so." (Teblum Doc. # 766 at 7; Rodrique Doc. # 300 at 7). Plaintiffs failed to bring the issues it complains of before the Court in a timely fashion and these issues are not properly before the Court. No jury trial is required and this case is closed.

Plaintiffs have not demonstrated that extraordinary circumstances exist entitling them to relief under Rule 60(b)(6). Further, in finding that relief under Fed. R. Civ. P. 60(b) (6) is not appropriate, this Court also draws upon the well settled principle that judgments should be final. This principle was well stated by the Eight Circuit in *Kansas Public Employees Retirement System v. Reimer & Koger Assoc. Inc.*, 194 F.3d 922, 925 (8th Cir. 1999): "Society's powerful countervailing interest in the finality of judgments simply requires that each case have an end, though the law continues to evolve. The common law could not safely develop if that latest evolution in doctrine became the standard for measuring previously resolved claims." (internal citation omitted).

Accordingly, it is now

ORDERED, ADJUDGED, and DECREED:

1. Plaintiffs' Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60 (Teblum Doc. # 767; Rodrique Doc. 1 301) is DENIED.

2. The Clerk is directed to file this Order in both the Teblum and Rodrique cases.

DONE and ORDERED in Chambers in Ft. Myers, Florida, this 18th day of May, 2006.

s : Virginia M. Hernandez-Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies: All counsel of record

APPENDIX F

United States Court of Appeals
Eleventh Circuit
Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.call.uscourts.gov

June 15, 2006

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 0643129-H
Case Style: Lance Teblum v. Eckerd Corporation of Florida, Inc.
District Court Number: 03-00495 CV-FTM-33DNF

NOTICE OF APPEAL FILED: May 26, 2006

After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). ?lease note that the issuance of a jurisdictional question does not stay the time

for -filing appellant's briefs otherwise provided by 11th Cir. R. 31-1.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Liz McDonald (404) 335-6187

c: District Court Clerk

APPENDIX G

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

For rules and forms visit
www.call.uscourts.gov

August 11, 2006

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 06-13129-BH
Case Style: Lance Teblum v. Eckerd Corporation of Florida, Inc.
District Court Number: 03-00495 CV-FTM-33DNF (03-00673)

Based upon the responses of the parties, it appears that this court has jurisdiction to consider this appeal. A final determination regarding jurisdiction will be made by the panel to whom this appeal is submitted on the merits.

Sincerely,

THOMAS K KAHN, Clerk

Reply To: Joe Caruso (404) 335-6177

The appellant brief and record excerpts are now due on September 20th.

c: District Court Clerk

Encl.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed MAY 22, 2007]

No. 06-13126-EE

DELICE RODRIQUE,
Plaintiff,

MARTIN SCHAEFER,
Plaintiff-Appellant,

versus

ECKERD CORPORATION OF FLORIDA, INC.,
Defendant,

ECKERD CORPORATION,
Defendant-Appellee.

No. 06-13129-EE

LANCE TEBLUM, BERNADETTE TEBLUM,
JOYCE BRINDLE, f.k.a. JOYCE CUNLIFFE, NANCY CIVITARESE,
Plaintiffs-Appellants,

RHONDA KLINE, *et al.*,
Plaintiffs,

versus

ECKERD CORPORATION OF FLORIDA, INC.,
Defendant,

ECKERD CORPORATION,
Defendant-Appellee.

EDWARD J. DIMMERLING,
Plaintiff-Appellant,

versus

ECKERD CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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BEFORE: BARKETT, KRAVITCH and STAHL*, *Circuit Judges.*

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

---

* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

APPENDIX I

MEDIATED SETTLEMENT AGREEMENT

WHEREAS, the Plaintiff, Martin Schaeffer, in case number 03-CV-519, on behalf of himself and all others similarly situated; and Plaintiffs, Lance Teblum, Bernadette Teblum, Joyce Brindle, and Nancy Civitarese, in case number 03-CV-495 on behalf of themselves and all others similarly situated; and Plaintiff Edward J. Dimmerling, in case number 03-CV-673, and Defendant, Eckerd Corporation agree on this date, April 11, 2006, to resolve a portion of the above matters as follows:

WHEREAS On February 7, 2006, the district court in the above referenced cases, entered its Order denying Defendant's Motion for Summary Judgment.

WHEREAS The district court's Order found a genuine issue of material fact as to the fifth prong of the fluctuating work week pay plan instituted by Defendant to wit: whether Eckerd erred in including non-productive time in its overtime calculations under the fluctuating work week method including, without limitation, the calculation of bonuses and other compensation.

WHEREAS The parties have agreed as follows:

1. Subject to district court approval, the Defendant shall pay to Plaintiffs in the above referenced cases the amount of $ 156,000.00 inclusive of all alleged unpaid overtime, and liquidated damages, for a three year period (preceding the filing of the respective lawsuits) as they pertain to the issues of Eckerd's inclusion of non-productive time in its overtime calculations. The Defendant shall pay to Plaintiffs' counsel, $ 144,000.00 as attorneys' fees and costs as they pertain to issues of Eckerd's inclusion of non-productive time in its overtime calculations. In the event that the district court

determines that the attorneys' fee and costs should be less than $144,000.00, any remaining monies shall revert to the Plaintiffs in the above cases *pro rata*.

2. The monies shall be distributed as follows within 30 days of the Court's order approving this settlement.

   a. Each named Plaintiff remaining in this lawsuit shall be paid the sum of $ 1,000.00 less applicable withholding; and

   b. The remaining qualified plaintiffs, who shall be defined as those Plaintiffs, named and opt-in plaintiffs, whose pay was impacted by Eckerd's inclusion of non-productive time in its overtime calculation, shall receive an equal share of $150,000.00 (and any reversion, if applicable).

3. The parties agree that this resolution shall not constitute an admission of liability by Defendant that 1) it has violated any provisions of the FLSA; 2) it has acted willfully, or 3) Plaintiffs are entitled to liquidated damages. Rather the parties agree that this is a compromise of a disputed claim for which Eckerd denies any and all liability.

4. The parties agree that this agreement may not be used in any proceeding or trial to prove any alleged wrongdoing by Eckerd as to the remaining claims that may exist under the above referenced cases.

5. The parties agree that should the Plaintiffs prevail in the remaining matters not settled herein, that the Defendant is entitled to an offset as to the damages and fees which have been actually paid pursuant hereto.

6. The parties agree that the settlement proceeds payable to the qualified Plaintiffs will be distributed to them after court approval net of applicable taxes and withholding. Within ten days of Court approval, the Plain-

tiffs' counsel shall provide a list of qualified plaintiffs, their last known address and social security number and the amount of proceeds to be distributed to that plaintiff

7. The parties agree that they do not waive any claims or defenses with respect to the pending motions or any further proceedings in this matter which are available to them under law.

8. The signatories for the Plaintiffs hereby aver that they have full and complete authority to sign on behalf of the Plaintiffs and the opt-in Plaintiffs.

9. This settlement is subject to Court approval as required by law. *See Lynn's Foods*.

10. Acceptance of monies under this Agreement constitute a complete release by qualified Plaintiffs, their heirs, successors, or assigns, of all claims pertaining to Eckerd's inclusion of non-productive time in its overtime calculations under the fluctuating work week method including, without limitation, the calculation of bonuses and other compensation.

11. Defendant's payment obligation shall be abated in the event an appeal is taken from the terms of this agreement whether by judgment or otherwise.

s/ : Illegible
For the Rodrique Plaintiffs

s : Illegible
For the Teblum Plaintiffs

s : Illegible
For the Defendant, Eckerd

s : Illegible
For the Dimmerling Plaintiffs